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# Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today

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*This Article compares and contrasts the legal and political treatment of the detention of citizens during World War II in Great Britain and the United States. Specifically, it explores the detentions as they unfolded, the very different positions that President Franklin D. Roosevelt and Prime Minister Winston Churchill took with respect to the detention of citizens, and the manner in which British and American courts reviewed challenges brought by those detained during the war. Comparing the experiences of the two countries reveals that in both cases the courts deferred extensively to the political branches when it came to reviewing challenges to the wartime detention policies, essentially staking out roles that left them largely relegated to the sidelines of public debates over the propriety of internment policies. A comparison of the British and American experiences also reveals that, as the war continued, the two chief executives struck decidedly different positions as to the wisdom and lawfulness of detention policies directed at citizens. In the United States, Roosevelt ignored the legal advice of many of his key advisers regarding the unconstitutionality of the detention of Japanese American citizens and—again against the advice of his advisers—later delayed the closing of the internment camps until after the 1944 election. By contrast, Churchill—who operated in a different legal context that granted him greater powers than his American counterpart—came to view such policies as inconsistent with British constitutional tradition and became a crucial voice urging the termination of such detentions.*

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*The Article then attempts to understand both why the two executives charted different courses on this issue as the war unfolded and whether there are any lessons to be drawn from these events with respect to how we should think about the separation of powers during wartime today. Focusing on the British experience during the war, Churchill's change of course suggests that the executive can and sometimes will take the lead in declaring and protecting a country's constitutional values without prodding by the courts, even in wartime, and even in the absence of legal compulsion. But as is explored in the pages that follow, the British experience may be a particularly British story and more generally one that differed in significant ways from the American story. This, in turn, calls into question just how much the British experience during the war should inform debates over the separation of powers in American constitutional law. The American experience during the war, moreover, proves a cautionary tale. Specifically, it reveals a series of failings on the part of the executive branch to acknowledge and engage with the facts on the ground and honor long-accepted constitutional traditions in formulating wartime policies. This example therefore suggests that the executive branch is ill equipped to self-regulate on this score in times of war. These failings in turn call into question the common practice of courts to defer extensively to the executive on matters of national security and more generally implicate fundamental questions about the judicial role in a constitutional democracy.*

*Although grounded in events that took place over seven decades ago, this study is undertaken for a very timely purpose. Once again, we live in a time in which the executive branch has argued that its decisions ostensibly predicated upon heightened concerns about national security should receive extensive, if not complete, deference from the Supreme Court. In addressing such arguments now and in the future, the Court would be wise to remember how judicial deference to executive branch assertions on matters of national security played out during World War II.*

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## INTRODUCTION

The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgement by his peers for an indefinite period, is in the highest degree odious, and is the foundation of all totalitarian Governments . . . .

Prime Minister Winston Churchill (1943)<sup>1</sup>

Unless the Writ of Habeas Corpus is suspended, I do not know of any way in which Japanese born in this country and therefore American citizens could be interned.

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1. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 21, 1943), in 5 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: CLOSING THE RING* app. A, Book 2 at 679 (1951).

Attorney General Francis Biddle (January 1942)<sup>2</sup>

[I]f it a question of safety of the country, the Constitution of the United States, why the Constitution is just a scrap of paper to me.

Assistant Secretary of War John J. McCloy (February 1942)<sup>3</sup>

February 19, 2017, marked the seventy-fifth anniversary of the issuance of now-infamous Executive Order 9066 by President Franklin Delano Roosevelt. What followed is well known to anyone versed in the events of World War II on the home front. In the wake of 9066's issuance, the United States witnessed, among many things, military regulations that imposed curfews, designated huge portions of the western United States as military areas of exclusion, and ultimately created "relocation centers" across the west—all aimed at controlling the movements of, and eventually involuntarily incarcerating,<sup>4</sup> approximately 120,000 persons of Japanese descent. Those detained under military orders during this period included over 70,000 United States citizens.<sup>5</sup>

Unearthing archival materials from the days and weeks leading up to issuance of 9066 reveals that key government officials—including President Roosevelt—knew or were counseled that any internment of Japanese American citizens would be in clear violation of the Suspension Clause of the United States Constitution.<sup>6</sup> Indeed, Roosevelt's Attorney General, Francis Biddle, repeatedly made this very argument to the President and members of Congress. Roosevelt nonetheless issued 9066, giving the military, in the words of one senior War Department official, "carte blanche" to proceed as it saw fit.<sup>7</sup> And later, when urged to shut down the camps, Roosevelt resisted, capitulating only after the 1944 election.

Meanwhile, to bolster 9066 and the War Department's actions, Congress enacted legislation criminalizing violations of the military regulations issued

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2. Letter from Attorney General Francis Biddle to Representative Leland Merritt Ford (Jan. 24, 1942) (Justice Department files), in MORTON GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* 257 (1949).

3. Transcript of Telephone Conversation Between Major Karl R. Bendetsen, assistant to the Judge Advocate General, Major General Allen W. Gullion, Provost Marshal General of the U.S. Army, and General Mark W. Clark, Deputy Chief of Staff of the Army Ground Forces at 2 (Feb. 4, 1942), in Documents of the Committee on Wartime Relocation and Internment of Civilians 5936, 5937, reel 5, at 579 (Frederick, MD, University Publications of America 1983) (quoting General Gullion's statement recounting "what McCloy said.")

4. The appropriateness of the term that should be used to describe the detention of Japanese Americans by the United States government during the war is debated among those who write about this period. This Article will at times use the term "internment" as the commonly used shorthand for the detention of Japanese Americans in Relocation Centers during the war, remaining mindful of these important debates.

5. The citizenship numbers surely would have been higher had then-existing naturalization laws not discriminated based on race, a practice that ended with the Immigration and Nationality Act of 1952. See Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. ch. 12).

6. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.")

7. FRANCIS BIDDLE, IN BRIEF AUTHORITY 218 (1962) (quoting Assistant Secretary of War John J. McCloy).

under 9066, rendering defiance of those regulations something few would risk.<sup>8</sup> When a handful of courageous individuals chose to defy certain regulations anyway, their prosecutions and convictions set in motion events that eventually landed their cases before the Supreme Court. In those cases, and one other that challenged outright the detention of Japanese Americans during the war, the Court was at best unwilling to engage with the Constitution in evaluating the government's actions and at worst complicit in the constitutional violations that led to the mass detention of Japanese Americans in the first place.<sup>9</sup>

In the decades since President Roosevelt issued 9066, both Congress and several presidents have offered apologies and declared that what happened during the war should never happen again.<sup>10</sup> Congress also enacted legislation for the purpose of thwarting any future attempts to imprison United States citizens solely based on military orders.<sup>11</sup> Further, presidents have awarded the Presidential Medal of Freedom to three of the litigants, who—at great personal sacrifice—violated and then challenged the military regulations issued pursuant to 9066 all the way to the Supreme Court, highlighting their courage and efforts to raise awareness of this important period in history.<sup>12</sup> These three individuals, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu, also successfully pursued *coram nobis* proceedings to overturn their earlier criminal convictions under the military regulations.

In 1983, decades after the war, Congress ordered a thorough study of the events leading up to and surrounding the implementation of 9066.<sup>13</sup> In its report, the commission appointed by Congress concluded that the internment of Japanese Americans during World War II was the product of “race prejudice,

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8. See Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (repealed 1976).

9. The four cases to make their way to the Court out of the West Coast were *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); and *Ex parte Endo*, 323 U.S. 283 (1944). As is discussed below, *Endo* comprised a habeas challenge to the internment policy.

10. Many examples exist. They include the statement issued by President George H.W. Bush on the fiftieth anniversary of the bombing of Pearl Harbor in 1991: “No nation can fully understand itself or find its place in the world if it does not look with clear eyes at all the glories and disgraces, too, of the past. We in the United States acknowledge such an injustice in our own history: The internment of Americans of Japanese ancestry was a great injustice, and it will never be repeated.” George H.W. Bush, Remarks to World War II Veterans and Families in Honolulu, Hawaii, 1991 PUB. PAPERS 1573, 1574 (Dec. 7, 1991), <https://bush41library.tamu.edu/archives/public-papers/3719> [<http://perma.cc/G65W-J39C>].

11. See Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 847 (1971) (codified in 18 U.S.C. § 4001(a) (2012)).

12. Specifically, Presidents Clinton and Obama awarded Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui the Presidential Medal of Freedom. As I have written elsewhere, Mitsuye Endo Tsutsumi, who died in 2006, deserves the same recognition. See Amanda L. Tyler, *Unsung WWII Hero Deserves the Medal of Freedom*, SACRAMENTO BEE (August 25, 2016), <https://www.sacbee.com/opinion/california-forum/article97641497.html> [<https://perma.cc/4E25-J8T2>].

13. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: PART 2: RECOMMENDATIONS 1 (1983) [hereinafter PERSONAL JUSTICE DENIED, PT. 2].

war hysteria and a failure of political leadership.”<sup>14</sup> Notably, the commission also concluded that “no documented acts of espionage, sabotage or fifth column activity were shown to have been committed by any identifiable American citizen of Japanese ancestry or resident Japanese alien on the West Coast” in the period leading up to the orders.<sup>15</sup> And, just this past Term, the Supreme Court overruled (albeit in *dictum*) its infamous decision in *Korematsu v. United States*, a 1944 holding that rejected a challenge to the discriminatory aspects of the exclusion orders issued under 9066 during the war.<sup>16</sup>

Across the Atlantic in Great Britain during the war, Regulation 18B of the wartime Defence (General) Regulations empowered the executive to detain outside the criminal process those citizens believed to pose a danger to national security. In contrast to the staggering numbers of Japanese Americans interned during the war in the United States, the Home Office detained just shy of 2,000 British citizens under Regulation 18B during the same period. Nonetheless, at least one modern commentator has labeled the detentions “as gross an invasion of British civil liberty as could be conceived.”<sup>17</sup> When the detention program commenced, Prime Minister Winston Churchill was reportedly an enthusiastic supporter.<sup>18</sup> Indeed, when speaking more generally of wartime enemies within Great Britain at the start of the war, Churchill famously proclaimed: “Collar the lot!”<sup>19</sup> When challenges to the program found their way into the courts during the war, they ran directly or indirectly into the proposition that Parliamentary sovereignty is a basic principle of the unwritten British constitution. (The United Kingdom’s Supreme Court recently reaffirmed this idea in its Brexit decision.<sup>20</sup>) Put another way, it is essentially a canonical proposition that Parliament possesses “the right to make or unmake any law whatsoever.”<sup>21</sup> As history had revealed long before, the principle of parliamentary sovereignty meant that even the celebrated English Habeas Corpus Act of 1679 and its important protections of individual liberty existed at the mercy of Parliament. And so it was that

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14. *Id.* at 5.

15. *Id.* at 3.

16. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))).

17. A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 1 (reprint 2005) (1992). Simpson’s book provides an extensive analysis of the detentions that followed under Regulation 18B. Simpson continued the above sentence by observing that the detentions were “only justifiable, if at all, by the grim necessity of the time.” *Id.*

18. *See id.* at vii.

19. PETER GILLMAN & LENI GILLMAN, ‘COLLAR THE LOT!’: HOW BRITAIN INTERNED AND EXPELLED ITS WARTIME REFUGEES 153 (1980).

20. *See* R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (appeal taken from Eng. and Wales).

21. *Id.* (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (8th ed. 1915)).

Regulation 18B and all the detentions that followed under it almost entirely escaped judicial scrutiny.

Notably, however, as the war continued, Regulation 18B and the detentions under it garnered a new and severe critic in Prime Minister Churchill. Specifically, by the fall of 1943, Churchill wrote of the importance of “the great principle of *habeas corpus* and trial by jury, which are the supreme protection invented by the British people for ordinary individuals against the State.”<sup>22</sup> At this point, Churchill argued for the repeal of 18B, counseling “strongly” that “such powers . . . are contrary to the whole spirit of British public life and British history.”<sup>23</sup> Churchill’s change of course came in the face of broad support for continuing the 18B program. In an important message to his Home Secretary, Churchill not only urged the repeal of 18B, he also observed that “[p]eople who are not prepared to do unpopular things and to defy clamour are not fit to be Ministers in times of stress.”<sup>24</sup> To posit that Churchill’s approach during the war on this score differed from that of his American counterpart, Roosevelt, would be an understatement of considerable proportions.

This Article compares and contrasts the legal and political treatment of the detention of citizens during World War II in Great Britain and the United States. Specifically, it explores the detentions as they unfolded, the very different positions taken by Prime Minister Churchill and President Roosevelt with respect to the legality of such policies, and the treatment of the challenges to detention that made their way into the British and American courts. Given that Great Britain and the United States share a common legal tradition in which the privilege of the storied writ of *habeas corpus* looms large, there is much to be learned from drawing such comparisons.

To begin, the courts in both countries deferred extensively during the war to the political branches when it came to reviewing challenges to the wartime detention policies. Specifically, in Great Britain, the Law Lords declined to scrutinize the basis for detentions or second-guess the Home Secretary’s good faith in issuing orders.<sup>25</sup> Meanwhile, in the United States, the Supreme Court only pushed back on the government’s wartime policies after the war, having handed down its infamous *Korematsu* decision (and two other decisions of similar effect) during the war.<sup>26</sup> That resistance came in the Court’s 1946 decision in *Duncan v. Kahanamoku*,<sup>27</sup> which held unlawful the government’s declaration of martial law in the Hawaiian Territory during the war. (To be sure,

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22. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 21, 1943), in 5 CHURCHILL, *supra* note 1, at 679.

23. Cable from Prime Minister Winston Churchill to Deputy Prime Minister Clement Attlee and Home Secretary Herbert Morrison (Nov. 25, 1943), in 5 CHURCHILL, *supra* note 1, at 680.

24. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 29, 1943), in 5 CHURCHILL, *supra* note 1, at 681.

25. See *Liversidge v. Anderson* UKHL [1942] AC 206 (appeal taken from Eng.).

26. See *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

27. 327 U.S. 304 (1946).



the Court's 1944 decision in *Ex parte Endo*<sup>28</sup> did hand the government a loss with respect to the full breadth of its internment policies, but the Court decided the case on the narrowest possible grounds and delayed issuing the decision to permit the White House to preempt its effect.) Thus, during the war, it is fair to say that the courts in both countries staked out roles that left them largely relegated to the sidelines of public debates over the propriety of internment policies.

As the war continued, however, the two chief executives struck markedly different positions on the wisdom and lawfulness of detention policies directed at citizens. In the United States, Roosevelt ignored the legal advice of many of his key advisers regarding the unconstitutionality of the detention of Japanese American citizens and—again against the advice of his advisers—later delayed the closing of the Japanese American detention camps until after the 1944 election. By contrast, Churchill, who operated in a decidedly different legal context that did not include a written constitution and granted him greater powers than his American counterpart, came to question such policies (in particular, Regulation 18B, which established the relevant governing framework) and argued against their continuation as the war unfolded.

What can be learned from these comparisons to shed light on how we should think about the separation of powers in wartime today? To begin, training one's focus on the British experience during the War and specifically Churchill's change of course suggests that the executive can, and sometimes will, take the lead in declaring and protecting a country's constitutional values without prodding by the courts—even in wartime and even in the absence of legal compulsion. There are, however, reasons to pause before assigning too much weight to the British experience for purposes of informing contemporary debates about the separation of powers in American constitutional law. This is because Churchill operated within a constitutional tradition that looked to Parliament—and not so much the courts—to protect individual liberty. Thus, many of the leading works on the British Constitution say very little about the British courts, instructing instead, as Sir Ivor Jennings once wrote, that "[t]he law is what Parliament provides, and it is in Parliament that the focus of our liberties must be found."<sup>29</sup> Further, unlike Roosevelt, Churchill did not face a general election during the war, which insulated him to some extent from popular pressures.<sup>30</sup> (Notably, Roosevelt only relented to closing the camps in the United States after winning the 1944 election.)

It was also the case that individuals swept up in the detentions that followed under Regulation 18B included Churchill's relatives by marriage and a segment

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28. 323 U.S. 283 (1944).

29. IVOR JENNINGS, THE BRITISH CONSTITUTION 208 (5th ed. 1966).

30. Pursuant to a truce among the leading parties, no elections occurred in Great Britain during the war, with the first general election coming two months after VE Day in July 1945. See STEPHEN BROOKE, LABOUR'S WAR: THE LABOUR PARTY DURING THE SECOND WORLD WAR 37–38, 326–37 (1992).

of British society that was not ethnically distinct from those in power. The contrast with American detention policies during the war—which exclusively targeted persons of Japanese ancestry—highlights the significance that race surely played in the two countries as the policies were implemented and reviewed. Indeed, the Japanese American community had been excluded from full integration into American society, and, as is explored below, the Supreme Court even called into question their ability to assimilate during the war in its *Hirabayashi* decision. The distinctive aspects of the American experience underscores that there are times when countermajoritarian courts may be especially important to the enforcement of constitutional norms, given their ability to protect minority rights in the face of majoritarian political pressures.

More generally, the American experience during World War II proves a cautionary tale on just about every front. Studying the series of failings on the part of the executive branch that led to the internment and violated long-accepted constitutional traditions (of which its officers were plainly aware) calls into question the ability of the executive branch to self-regulate on this score. (In some respects, this is not surprising given that, as will be shown, Roosevelt made clear his belief that it was for the courts to wrestle with such questions.) As a review of the period leading up to implementation of the Japanese American internment demonstrates, moreover, the executive branch misrepresented enormously important factual matters to the courts when its actions came under legal challenge. Together, these failings highlight the perils in the common practice of courts to defer extensively to the executive on matters of national security, as the Supreme Court did during the war. Ultimately, studying the American experience during the war implicates fundamental questions about the judicial role in the American constitutional tradition and particularly the American separation of powers.

This Article proceeds as follows. Part I offers a primer in the English legal origins of the privilege of the writ of habeas corpus before discussing how habeas law has unfolded in the United States and in Great Britain since American independence. Accordingly, this Part discusses the Suspension Clause in the United States Constitution, which protects the privilege of the writ of habeas corpus from suspension, and the evolution of British habeas law, giving special attention to events spanning the last century. As part of this discussion, the Article gives an overview of the profound influence that the English Habeas Corpus Act of 1679 wielded on the development of Anglo-American habeas law and eventually the United States Constitution.

Part II turns to the British experience during World War II, exploring the implementation of Regulation 18B, the challenges to 18B that made their way into British courts, and Prime Minister Churchill's changing views of the regulation. As this Part reveals, during the war, as in earlier periods of English and British history, the storied writ of habeas corpus remained powerfully

influential in how government actors navigated the legal landscape of executive detention in wartime.

Part III trains its focus on the United States, picking up the story in the immediate wake of the Japanese bombing of Pearl Harbor to discuss the government's initial reaction to the attack and the events that transpired in the Hawaiian Territory, where suspension and martial law governed during much of the war. Next, the Article turns to the mainland and traces the developments leading up to the issuance of 9066 and its early implementation, highlighting the lack of any concrete evidence to support the policies put in place under 9066. This Part also underscores the fact that many noteworthy members of the Roosevelt Administration—including the Attorney General—recognized that the detention of United States citizens outside the criminal process and in the absence of a valid suspension violates the Suspension Clause.

In Part III, the Article studies the wartime period's Supreme Court decisions to try and understand why the Suspension Clause played no role in the Court's deliberations. As part of this analysis, the Article gives special attention to the often-overlooked but important case of *Ex parte Endo* as well as the Court's postwar *Duncan v. Kahanamoku* decision, which rebuked the government's military rule of the Hawaiian Territory during the war.

Finally, Part IV connects and compares the British and American experiences with detention of citizens during World War II to ascertain what this period in history can teach us today about the ability of the executive branch to self-police for compliance with constitutional values in wartime as well as the proper role of the courts during such periods.

Although grounded in events that took place over seven decades ago, this study is undertaken for a very timely purpose. Once again, the Supreme Court has been called upon to address challenges to executive branch actions during a time of heightened concerns about national security, with terrorism remaining an ever-present threat to the United States. And once again, in defending its actions in the face of legal challenges, the executive branch has maintained that its decisions should receive extensive, if not complete, deference from the Court. Just last Term, the current administration argued that the Supreme Court should defer extensively to—if not decline to review outright—its judgments regarding national security. In particular, and the administration called for deference from the Court with respect to its judgments that informed the contours of the third iteration of the so-called “Travel Ban,” which bars individuals from certain countries from entering the United States. In that case, *Trump v. Hawaii*, the government argued that its policy followed directly from the President's authority over the borders, national security, and foreign policy.<sup>31</sup> Further, before the Court, the government assailed lower court decisions that had struck down the policy for “overrid[ing] the President's judgments on sensitive matters of

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31. Petition for Writ of Certiorari at 25–26, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

national security and foreign relations, and severely restrict[ing] the ability of this and future Presidents to protect the Nation.”<sup>32</sup> As we now know, a majority of the Supreme Court sided with the Administration and upheld the Travel Ban, doing so in part based upon its belief that the judiciary “cannot substitute [its] own assessment for the Executive’s predictive judgments on such matters [relating to “national security interests”], all of which ‘are delicate, complex, and involve large elements of prophecy.’”<sup>33</sup> Against the backdrop of the history explored herein, the Article concludes by arguing that any evaluation of the Court’s deference to the executive branch in the Travel Ban litigation and more generally the proper judicial role in times of war should take into account how judicial deference to executive branch assertions regarding matters of national security played out during World War II.

# I.

## THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS IN THE ANGLO-AMERICAN LEGAL TRADITION

“The Privilege of the Writ of Habeas Corpus” and the concept of suspension both trace their origins to English judicial and parliamentary practice. Thus, before discussing the place of these concepts in the modern legal frameworks of Great Britain and the United States, it is imperative that one study the English backdrop upon which modern habeas jurisprudence in both countries is predicated.<sup>34</sup> Put another way, borrowing from Chief Justice John Marshall, to understand the role of habeas corpus in the Anglo-American legal tradition, one must look to the privilege’s origins in English law. As he once phrased it, “this great writ” was “used in the constitution, as [a term] which was well understood.”<sup>35</sup>

The story begins with the common law writ of habeas corpus *ad subjiciendum*, a judicial creation that demanded cause for a prisoner’s detention from his jailer.<sup>36</sup> As historian Paul Halliday has detailed, the common law writ came into regular use in the seventeenth century as a “writ of the prerogative”—namely, as the embodiment of royal power invoked by the Court of King’s Bench in aid of the king’s obligation to look after his subjects.<sup>37</sup> Over time, English

32. *Id.* at 16.

33. *Trump*, 138 S. Ct. at 2421 (internal citation omitted); *see id.* at 2422 (positing that “the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving ‘sensitive and weighty interests of national security and foreign affairs’”).

34. For greater explication of this background, consult AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* (2017) [hereinafter TYLER, *HABEAS CORPUS IN WARTIME*].

35. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830).

36. This writ, also called *ad subjiciendum et recipiendum*, translates as “to undergo and receive” the “corpus,” or body, of the prisoner. The writ was directed to the relevant custodian, or jailor, who had custody of the prisoner.

37. *See* PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 9 (2010). As Halliday recounts, Chief Justice Sir Henry Montagu described habeas corpus in 1619 as a “writ of the

judges came to employ the writ as a tool for inquiring into both the cause of the initial arrest and ongoing detention of those who could claim to fall within the protection of domestic law.<sup>38</sup> Nonetheless, early in the seventeenth century, royal courts regularly countenanced habeas returns that cited the King's command to imprison as sufficient justification to detain, or at least sufficient to preclude judicial inquiry into detention. Courts did so based on the contemporary understanding that the crown's directives themselves constituted the "Law of the land."<sup>39</sup>

Over the course of the seventeenth century, judicial and legislative developments moved toward rejecting the idea that the royal command alone could constitute legitimate cause to arrest and detain. An enormously important moment in the story came with the passage of the English Habeas Corpus Act of 1679. Parliament's adoption of the Habeas Corpus Act coincided with the rise of parliamentary supremacy and a broader parliamentary effort to take control over matters of detention from the monarch and its courts. With the Act, Parliament came to manage and define what constituted legal cause to detain. In so doing, royal fiat ceased to suffice.

#### A. *The English Habeas Corpus Act of 1679 and the Early English Suspensions*

The English Habeas Corpus Act of 1679 proved the culmination of a lengthy effort during the seventeenth century, spearheaded at its origins by John Selden and Sir Edward Coke, to secure strict limitations on what would constitute legitimate "cause" for the crown's detention of individuals.<sup>40</sup> The Act, entitled "An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas,"<sup>41</sup> declared that it was intended to address "great Delayes" by jailers "in makeing Returnes of Writts of Habeas Corpus to them directed" as well as other abuses undertaken "to avoid their yielding Obedience to such Writts . . ."<sup>42</sup> Toward that end, the Act declared that it was "[f]or the prevention whereof, and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters."<sup>43</sup>

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prerogative by which the king demands account for his subject who is restrained of his liberty." *Id.* at 65 (quoting Habeas Corpus al Cinque-Ports pur un Borne Imprison La (1619) 81 Eng. Rep. 975 (KB)).

38. *Id.* at 48–53.

39. See, e.g., Darnel's Case (1627) 3 St. Tr. 1. 22 H. (KB) (Eng.), in 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1 (1809) (often called the "Case of the Five Knights").

40. For an explication of the period leading up to and surrounding enactment of the English Habeas Corpus Act, consult Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016) [hereinafter Tyler, *A Second Magna Carta*].

41. 31 Car. C. 2 (Eng.).

42. Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 1 (Eng.), reprinted in 3 THE FOUNDER'S CONSTITUTION 310 (Philip B. Kurland & Ralph Lerner eds., 1987). By its terms, the Act sought to remedy the fact that "many of the King's subjects have beene and hereafter may be long detained in Prison in such Cases where by Law they are baylable." *Id.*

43. *Id.*

Accordingly, the Habeas Corpus Act's focus—cases involving persons imprisoned “for any Criminall or supposed Criminall Matter”—serves to underscore its close connection to the criminal process.<sup>44</sup> In short order, the Act came to be understood as embracing not just the cases of ordinary criminals, but domestic enemies of the state as well.

Many of the Act's provisions codified preexisting, though not necessarily uniformly followed, judicial practices tied to the common law writ. It is therefore important to understand that in practice the Act served to complement the common law writ, using the preexisting writ as a vehicle for enforcing its terms. The common law writ, as Blackstone noted, also continued to serve as the vehicle for redress available in “all . . . cases of unjust imprisonment” that were not covered by the Act.<sup>45</sup> But beyond codifying certain practices already followed by some courts, where the Act applied, Parliament took control over a good deal of habeas law from the courts, and it did so with a statute that by its terms required courts to follow its mandates under threat of penalty.<sup>46</sup>

Further, with the Act, Parliament drastically limited the justification for detentions that would survive legal scrutiny. For example, the third section of the Act set forth procedures for obtaining writs during court vacation periods, and later sections provided that the Act would reach so-called “privileged places” and other areas previously beyond the range of habeas courts. Additionally, the seventh section made clear the connection between the writ of habeas corpus and the criminal process. It covered “any person or persons . . . committed for High Treason or Fellony” and provided that where a prisoner committed on this basis was not indicted within two court terms (a period typically spanning only three to six months), the judges of King's Bench and other criminal courts were “*required . . . to sett at Liberty the Prisoner upon Baile.*”<sup>47</sup> Finally, the section declared that “if any person or persons committed as aforesaid . . . shall not be indicted and tryed the second Terme . . . or upon his Tryall shall be acquitted, he shall be discharged from his Imprisonment.”<sup>48</sup>

Thus, in its seventh section, the English Habeas Corpus Act promised release to those held for criminal or “supposed” criminal matters, including even the most dangerous of suspects—those detained on accusations of treason—

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44. *Id.*

45. 3 WILLIAM BLACKSTONE, COMMENTARIES \*137 (observing that “all other cases of unjust imprisonment” not covered by the Act were “left to the *habeas corpus* at common law”) [hereinafter BLACKSTONE'S COMMENTARIES].

46. 1679, 31 Car. 2, c. 2, § 10.

47. *Id.* §§ 3, 7 (emphasis added). The judicial mandates came under threat of financial penalty at set forth in Section 10. See *id.* § 10. Note that over time the relevant language from section 7 moved to section 6 of the Act.

48. *Id.* Judges initially often evaded the Act's protections by setting excessive bail; for that reason, the Bill of Rights in 1689 declared that courts should not require excessive bail. See Bill of Rights of 1688, 1 W. & M., sess. 2, c. 2, § 1 (Eng.).

where they were not timely tried.<sup>49</sup> Those held for suspected treason during the Jacobite Wars of the late seventeenth and eighteenth centuries, and later during the American Revolution, routinely invoked the Act's protections to their benefit, either to force timely trial on criminal charges or secure their discharge.<sup>50</sup> Military detention no longer existed for those who could claim the protections of domestic law. Instead, the Act promised such persons the protections of the criminal process in a timely fashion or else their freedom. Nor did the Act include any exceptions for times of war. It is for this very reason that Parliament invented the concept of suspension as a tool for displacing the protections associated with the Habeas Corpus Act during wartime.

It took Parliament only ten years to do so. The historical episodes of suspension during the late seventeenth and eighteenth centuries demonstrate that the consistent purpose behind them was the empowerment of the executive to arrest suspected traitors outside of the formal criminal process. For example, the very first suspension, which came in 1689 in the immediate wake of the Glorious Revolution, expanded the authority of the crown dramatically in the face of threats to the throne.<sup>51</sup> Having just been crowned in place of the dethroned James Stuart, King William of Orange asked Parliament to suspend the Habeas Corpus Act in order to arrest—solely on suspicion—Jacobite supporters who sought to reinstate the Stuart line.<sup>52</sup> As William's emissary conveyed the request to Parliament, the King sought the power to confine persons “committed on suspicion of Treason only,” lest they be “deliver[ed]” by habeas corpus.<sup>53</sup> Parliament quickly obliged and in so doing created the concept of suspension.

In the decades that followed, numerous attempts by the Jacobites to regain the British throne, combined with constant fighting with France, triggered additional suspensions.<sup>54</sup> In each of these suspensions, Parliament empowered the crown to arrest, on suspicion alone, individuals believed to pose a danger to the state and to detain them for the duration of the suspension without obligation

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49. Chief Justice John Holt wrote shortly after passage of the English Act that its “design . . . was to prevent a man's lying under an accusation for treason, &c. above two terms.” *Crosby's Case* (1694) 88 Eng. Rep. 1167, 1168 (K.B.) (Holt, C.J.).

50. For details on many such cases, consult Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635 (2015) [hereinafter Tyler, *Habeas Corpus and the American Revolution*].

51. 1688, 1 W. & M., c. 2 (Eng.); see also 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS: FROM THE RESTORATION TO THE PRESENT TIME 284–85 (Richard Chandler ed., London, n. pub. 1742) (noting royal assent granted on March 16, 1689).

52. For details, see TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34, at 35–39.

53. 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 12930 (Anchitell Grey ed., London, n. pub. 1763) (remarks of Richard Hampden). For discussion of this suspension and its extensions, along with subsequent suspensions during the following decades, consult Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 934–44 (2012) [hereinafter Tyler, *The Forgotten Core Meaning of the Suspension Clause*].

54. The last suspension predating the American Revolution came in response to the Jacobite Rebellion in Scotland in 1745. For details, see TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34, at 40–51.

to try them on criminal charges.<sup>55</sup> Notably, in every one of these episodes, suspension was understood as setting aside the protections of the seventh section of the Habeas Corpus Act, as well as any complementary common law habeas role for the courts. Accordingly, the suspension model established during the period leading up to the Revolutionary War contemplated that it was only by displacing the seventh section of the Act that detention outside the criminal process of persons who could claim the protection of domestic law could be made lawful—even in wartime.<sup>56</sup>

*B. The English Habeas Corpus Act and Suspension in the Early American Experience*

Although the British suspension model was well settled by the middle of the eighteenth century, the American Revolutionary War placed tremendous pressure on its stability. Meanwhile, the movement for independence that drove the war proved an opportunity for the Americans to build their own legal frameworks.

The American Founding generation knew a great deal about the benefits of the English Habeas Corpus Act. Indeed, the crown's denial of the Act's protections to the colonists constituted a major complaint about British rule and contributed to the movement for independence. In 1774, the Continental Congress decried the fact that colonists were "the subjects of an arbitrary government, deprived of trial by jury, and when imprisoned cannot claim the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty . . . ."<sup>57</sup> Such complaints followed on the heels of several failed efforts by various colonies to adopt the Act for themselves.<sup>58</sup> Steeped in their Blackstone, the colonists read that the Act was a "bulwark" of "liberties" and a "second *magna carta*."<sup>59</sup> They wanted to enjoy this second *Magna Carta* too.

This patchwork legal framework—the Act applying in some geographic areas of the British Empire, but not in others—came to play a major role in how

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55. *See id.*

56. That being said, during this same period, Parliament also often invoked its power of attainder to circumvent the protections of the Habeas Corpus Act. *Id.* at 45–46 (detailing the plight of John Bernardi). As a separate matter, suspension was not understood as necessary to detain those properly classified as prisoners of war for preventive purposes. *See* 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 159 (Sollom Emlyn ed., Philadelphia, Robert H. Small 1847) ("[T]hose that raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors . . . ."); *see also* HALLIDAY, *supra* note 37, at 170–73.

57. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 88 (Worthington Chauncey Ford ed., 1904); *see also id.* at 10708 (reiterating the same complaints) (replicating Lettre Adressée aux Habitans de la Province de Quebec (Oct. 26, 1774)).

58. For details, *see* TYLER, *HABEAS CORPUS IN WARTIME*, *supra* note 34, at 101–08.

59. BLACKSTONE'S COMMENTARIES, *supra* note 45, at 133. Blackstone's *Commentaries*, which grew out of his lectures, were published between 1765 and 1769. The timing and circulation of Blackstone's *Commentaries* meant that they wielded profound influence on the development of early American law.



the British treated their so-called American “Rebel” prisoners captured during the Revolutionary War. A steady stream of prisoners brought to England early in the War led the Prime Minister, Lord Frederick North, to push for a suspension in order to detain American Rebels on English soil outside the criminal process.<sup>60</sup> The most notable of the early detentions, and a major impetus for suspension, was the case of Ethan Allen and his Green Mountain Boys, who had been captured during their failed attempt to take the city of Montreal. In short order, British Lieutenant Governor Cramahé ordered Allen along with his cohort of “Rebel Prisoners” dispatched to England. Cramahé did so, in his words, because he had “no proper Place to confine them in, or Troops to guard Them” in Canada.<sup>61</sup> After a weeks-long journey across the Atlantic Ocean, the prisoners landed in Falmouth, England days before Christmas in December 1775.<sup>62</sup> The British imprisoned Allen and his Boys at Pendennis Castle in Cornwall. But within only a few days, the British legal elite met and decided to send Allen and his fellow Rebels back to America as soon as possible.<sup>63</sup> *Why?*

The answer to this question reveals a great deal about the status of Anglo-American habeas law during this important period. To begin, it is apparent that political calculations were very influential here, stemming from the North Administration’s apparent uncertainty as to whether it could successfully prosecute the Rebels as traitors. Further, extensive contemporary evidence suggests that efforts were underway to invoke the protections of the English Habeas Corpus Act on behalf of Allen and his fellow Rebels in the British courts.<sup>64</sup> Internal documents memorializing British officials debating what to do with Allen show how these factors influenced those decisions made with respect to the detention of Allen and his Boys. As one admiralty lord wrote just days after Allen’s arrival in England, the Administration’s “principal object” must be “to get the prisoners out of reach as soon as possible.”<sup>65</sup> Out of reach of what? The answer, most likely, was the British courts, where a subject like Allen—held on English soil—had the right to invoke the protections of the Habeas Corpus Act and thereby force his trial or else secure his freedom. But across the Atlantic,

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60. For details, see Tyler, *Habeas Corpus and the American Revolution*, *supra* note 50, at 667–70.

61. *Id.* at 649–55 (detailing Allen’s capture, transport, detention, and dispatch back across the Atlantic).

62. *Id.*

63. For details, see Letter from Lord George Germain to the Lords Commanders of the Admiralty (Dec. 27, 1775), The National Archives (TNA) (Great Britain) CO 5/122/398.

64. For example, *The Annual Register* for 1775 reported of the prisoners: “whilst their friends in London were preparing to bring them up by *habeas corpus*, to have the legality of their confinement discussed, they were sent back to North-America to be exchanged.” 18 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1775, at 187 (J. Dodsley ed., London 1776). Similar stories ran contemporaneously in multiple other British papers, including several that named prominent habeas counsel with ties to the American cause as having taken on the case.

65. Letter from Lord Hugh Palliser to the Earl of Sandwich (Dec. 29, 1775), in 1 THE PRIVATE PAPERS OF JOHN, EARL OF SANDWICH, FIRST LORD OF THE ADMIRALTY 1771–1782, at 87 (G.R. Barnes & J.H. Owen eds., 1932).

the Habeas Corpus Act did not apply, or at least, that was the position that the crown had taken for some time. Thus, by sending Allen back across the Atlantic, the administration could elude the Habeas Corpus Act.

As the Revolutionary War continued, however, British ships began arriving in a constant stream to deposit American prisoners on British shores. This meant that Parliament had to address the legal status of American Rebels held on English soil, where the Habeas Corpus Act was in full effect. In early 1777, Lord North responded to these developments by invoking the same tool that earlier administrations had wielded during similar periods of unrest: he proposed a suspension. Introducing the measure to Parliament, Lord North explained:

[I]t had been customary upon similar occasions of rebellion, or danger of invasion, to enable the king to seize suspected persons . . . . But as the law stood . . . it was not possible at present officially to apprehend the most suspected person . . . . It was necessary for the crown to have a power of confining them like other prisoners of war.<sup>66</sup>

In other words, the North Administration sought to legalize the detention of American Rebels during the war without having to bring them to trial on criminal charges.

As enacted, the suspension legislation applied only to persons suspected of high treason or piracy committed in America or on the high seas and authorized their detention without bail or mainprize.<sup>67</sup> Parliament was careful to target only Americans, and did so for the purpose of addressing “a Rebellion and War [that] ha[s] been openly and traiterously levied and carried on in certain of his Majesty’s Colonies and Plantations in *America*, and Acts of Treason and Piracy [that] have been committed on the High Seas.”<sup>68</sup> Acknowledging that many American prisoners “have been, or may be brought into this Kingdom, and into other Parts of his Majesty’s Dominions,” Parliament embraced the need for legislation modeled upon earlier suspension acts. It did so because, as it explained in the Act’s terms, “it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals, and at the same Time of evil Example to suffer them to go at large.”<sup>69</sup> Parliament subsequently extended the legislation several times to last through much of the war.

Once enacted, the legislation, popularly known as North’s Act, quickly earned the ire of Americans. George Washington complained in his *Manifesto* that Parliament had now sanctioned “arbitrary imprisonment” by reason of the

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66. 19 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 4 (T.C. Hansard ed., London 1814) (remarks of Lord Frederick North given to the House of Commons on February 6, 1777).

67. Although legally distinct from bail, mainprize served a similar function by setting a party at liberty until a stipulated date of appearance.

68. An Act to Impower his Majesty to Secure and Detain Persons Charged with, or Suspected of, the Crime of High Treason, Committed in any of his Majesty’s Colonies or Plantations in *America*, or on the High Seas, or the Crime of Piracy, 17 Geo. 3, c. 9 (1777) (Gr. Brit.).

69. *Id.*; see 35 H.L. JOUR. (1777) 78, 82–83 (Gr. Brit.) (noting royal assent given March 3, 1777).

“suspension of the Habeas Corpus Act.”<sup>70</sup> Over the course of its lifetime, the Act rendered lawful the indefinite detention without trial of almost three thousand captured Americans brought to England during the Revolutionary War.

It was only once independence became a foregone conclusion that Parliament finally permitted the suspension to lapse, recognizing that the law was no longer necessary to hold the remaining American prisoners on English soil without trial. As peace negotiations got under way, Parliament declared that the British Government’s relationship with the American prisoners—now viewed as being in the service of a newly acknowledged (if not yet formally recognized) independent country—was no longer governed by domestic law. Instead, Parliament declared that the Americans would have to look for protection to the Law of Nations, which permitted the detention of prisoners of war without criminal trial for the purpose of preventing their return to the battlefield.<sup>71</sup>

Meanwhile, on the other side of the Atlantic, the newly declared independent states were embracing as their own the English Habeas Corpus Act as well as the concept of suspension in some cases. In studying the legal frameworks of the original states, one finds extensive evidence indicating that the idea of the habeas privilege was inextricably linked to the English Habeas Corpus Act, and unsurprisingly, a number of states quickly moved to adopt the Act’s terms formally as part of their new constitutions and codes.<sup>72</sup>

During the Revolutionary War, moreover, at least six of the newly declared independent states enacted their own suspension acts modeled on English

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70. George Washington, *Manifesto of General Washington, Commander in Chief of the Forces of the United States of America, in Answer to General Burgoyne’s Proclamation* (July 19, 1777), in 47 THE GENTLEMAN’S MAGAZINE, AND HISTORICAL CHRONICLE FOR THE YEAR 1777, at 456–57 (Sylvanus Urban ed., London, Sept. 1777), reprinted in CONTINENTAL J. & WKLY. ADVERTISER 3 (Bos.) (Mar. 5, 1778).

71. The statute declared that “it may and shall be lawful for his Majesty, during the Continuance of the present Hostilities, to hold and detain . . . as *Prisoners of War*, all Natives or other Inhabitants of the Thirteen revolted Colonies not at His Majesty’s Peace.” The Act likewise authorized the discharge or exchange of such prisoners “according to the Custom and Usage of War, and the Law of Nations . . . any Warrant of Commitment, or Cause therein expressed, or any Law, Custom, or Usage, to the contrary notwithstanding.” See An Act for the Better Detaining, and More Easy Exchange, of American Prisoners Brought into Great Britain of 1782, 22 Geo. 3, c. 10 (1782) (Gr. Brit.); see also 36 J. OF HOUSE OF LORDS 1779–1783 at 425–426 (London 1767–1830) (Gr. Brit.) (noting royal assent given March 25, 1782).

72. The prominence of the Act in early American legal discourse is demonstrated in many quarters. For instance, South Carolina’s newly declared independent General Assembly took up confirmation of the Act’s operation in March 1776 as one of its very first matters. See JOURNAL OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA, MARCH 26, 1776–APRIL 11, 1776, at 21, 24, 26 (A.S. Salley, Jr. ed., 1906). Another prominent example may be found in Georgia’s Constitution of 1777, which included the express provision that “[t]he principles of the habeas corpus act shall be a part of this constitution.” GA. CONST. of 1777, art. LX. Georgia even went so far as to append verbatim copies of the English Habeas Corpus Act to its original distribution to ensure that all understood the link between its constitution’s habeas clause and the English Act. See CHARLES FRANCIS JENKINS, BUTTON GWINNETT: SIGNER OF THE DECLARATION OF INDEPENDENCE 109 (1926).

precedents from the late seventeenth and eighteenth centuries.<sup>73</sup> The states did so in order to legalize the detention of the disaffected outside the criminal process. Notably, some of these suspensions expressly set aside the Habeas Corpus Act. For example, in Maryland, its suspension legislation declared that “during any invasion of this state by the enemy, the *habeas corpus* act shall be suspended, as to all such persons . . . .”<sup>74</sup>

In the years during and following the war, a wave of states adopted (or, in some cases, reaffirmed) the core terms of the English Habeas Corpus Act, including particularly its seventh section, as part of their statutory law. Other states constitutionalized the Act’s terms. Some did so explicitly—as in the case of Georgia<sup>75</sup>—while others connected the habeas privilege to the concept of suspension and embraced the principle that without a suspension, anyone held on suspicion of criminal activity must be tried in due course, as in the case of the Massachusetts Constitution of 1780.<sup>76</sup>

Further, just three months before the Constitutional Convention convened in Philadelphia in 1787, New York passed a statute almost identical to the English Habeas Corpus Act. The legislation, tracking the seventh section of its English predecessor, made express the requirement that any person “committed for any treason or felony” who is not “indicted and tried [by] the second term [of the] sessions” of the relevant court “after his commitment . . . shall be discharged from his imprisonment.”<sup>77</sup> Highlighting the pervasive influence of the English Habeas Corpus Act on the development of early American law, the great New York jurist and legal commentator Chancellor James Kent observed in 1827 that “the statute of 31 Charles II. c. 2 . . . is the basis of all the American statutes on the subject.”<sup>78</sup>

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73. These states included Massachusetts, Pennsylvania, Maryland, South Carolina, Virginia, and New Jersey. For details of these suspensions, consult Tyler, *The Forgotten Core Meaning of the Suspension Clause*, *supra* note 53, at 958–68.

74. An Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism, ch. 20, § 12 (Feb. 5, 1777), in 1 THE LAWS OF MARYLAND 338, 340–41 (Virgil Maxcy ed., Philip H. Nicklin & Co. 1811).

75. GA. CONST. of 1777, art. LX.

76. MASS. CONST. of 1780, pt. 2, ch. VI, art. VII (“The privilege and benefit of the writ of Habeas Corpus, shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.”). The debates leading up to adoption of this provision, which demonstrate its connection to the protections of the English Habeas Corpus Act, are discussed in Tyler, *The Forgotten Core Meaning of the Suspension Clause*, *supra* note 53, at 963–64.

77. An Act for the Better Securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments (Feb. 21, 1787), in 1 LAWS OF THE STATE OF NEW YORK 369, 371–72 (Thomas Greenleaf ed., 1792).

78. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 24 (1827).

C. *Constitutionalizing the Privilege and Recognizing a “Partial Bill of Rights”*<sup>79</sup>

Such was the backdrop against which the American Founding generation drafted and ratified the Suspension Clause. It should therefore come as no surprise that the suspension framework tethered to the English Habeas Corpus Act continued to exert profound and extensive influence on American habeas jurisprudence—and particularly the Suspension Clause.

When the delegates to the Constitutional Convention convened in 1787, they set to work on a new federal structure that would replace the Articles of Confederation, which had established the structure of the federal government since independence. It was within the larger conversation about an independent federal judicial branch that the delegates turned to two protections that British rule had denied the colonists: namely, the rights associated with the English Habeas Corpus Act and the right to jury trial.<sup>80</sup> As the Convention unfolded, however, the delegates devoted only very limited time to debating the terms of what ultimately became the Suspension Clause in the United States Constitution.

Four days after the Convention came to order, Charles Pinckney introduced a draft plan to the Convention. It received no reported discussion, yet one of his proposals laid the groundwork for the Suspension Clause and introduced a concept that would survive in the Clause’s final form—namely, the restriction on suspensions “except in case of rebellion or invasion.”<sup>81</sup> Months later, Pinckney moved again for recognition of the habeas privilege, hand-in-hand with limitations on when it could be suspended.<sup>82</sup> As limited debate unfolded days later, the delegates came instead to embrace Gouverneur Morris’s proposed language, which read: “The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it.”<sup>83</sup>

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79. The Antifederalist publication, the *Federal Farmer*, while critical of the draft Constitution lacking a Bill of Rights, pointed to the Suspension Clause as a start. See Letter IV from the Federal Farmer to the Republican (Oct. 12, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 42, 45–46 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (positing that “the 9th and 10th Sections in Art. I. in the proposed constitution, are no more nor less, than a partial bill of rights; they establish certain principles as part of the compact upon which the federal legislators and officers can never infringe” and arguing that “this bill of rights ought to be carried farther”).

80. For details, see TYLER, HABEAS CORPUS IN WARTIME *supra* note 34, at 125–29.

81. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881) [hereinafter ELLIOT’S DEBATES] (replicating Charles Pinckney’s draft plan, Article VI).

82. Specifically, Pinckney’s proposal read: “The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a time period not exceeding months.” James Madison, Notes on the Constitutional Convention (Aug. 20, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340, 341 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

83. *Id.* at 438 (internal quotation marks omitted).

Madison's notes from the Convention recount that, at this point, the delegates took a vote on Morris's proposal. All agreed on the first part, which, standing alone, prohibited suspension under any circumstances: "The privilege of the writ of Habeas Corpus shall not be suspended." It was the second part of the proposed clause, which recognized a power to suspend "in cases of Rebellion or invasion, [where] the public safety may require it[.]" that elicited dissent in the ranks. Specifically, three states voted against including such language in the habeas clause: North Carolina, South Carolina, and Georgia.<sup>84</sup> Nonetheless, the delegates approved Morris' language, and the Committee of Style modified it only slightly by substituting "when" for "where."<sup>85</sup>

Notably, evidence suggests that the delegates clearly recognized an important connection among habeas corpus, suspension, and requiring the criminal prosecution of those taken into custody who could claim the protection of domestic law. For example, the delegates initially placed the Suspension Clause in the judiciary article (then-Article XI), right alongside the guarantee that "[t]he trial of all crimes (except in cases of impeachment) shall be by jury."<sup>86</sup>

Further, in promoting the draft Constitution in the *Federalist Papers*, Alexander Hamilton lauded the fact that the Constitution provided for "trial by jury in criminal cases, aided by the *habeas corpus act*."<sup>87</sup> Hamilton's language exemplified the widespread association of the proposed Suspension Clause with the English Habeas Corpus Act. Indeed, participants throughout the Ratification Debates connected the two directly. Others simply took for granted that the Clause's limitations on suspension were intended to safeguard the very protections that Parliament created suspension to set aside—namely, those associated with the seventh section of the English Habeas Corpus Act.<sup>88</sup> Highlighting the profound influence of the English Habeas Corpus Act on the Suspension Clause, Chief Justice Marshall would later write that when interpreting the Suspension Clause, we must look to "that law which is in a

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84. See Madison, in 2 FARRAND'S RECORDS, *supra* note 82, at 438; see also 1 ELLIOT'S DEBATES, *supra* note 81, at 270 (reporting the approval of Morris's proposed wording).

85. See Report of Committee of Style (Sept. 12, 1787), in 2 FARRAND'S RECORDS, *supra* note 82, at 596.

86. Madison, in 2 FARRAND'S RECORDS, *supra* note 82, at 438 (internal quotation mark omitted). The drafters originally put the two provisions in Article XI, Sections 4 and 5. See *id.* Later, the Committee of Style reorganized the articles and separated the two clauses. See Report of Committee of Style, in 2 *id.* at 590, 596, 601; see also U.S. CONST. art. III, § 2, cl. 3 (Jury Clause).

87. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Ian Shapiro ed., 2009).

88. As noted above, see *supra* note 79, even the Antifederalist *Federal Farmer* pointed to the Suspension Clause and its neighboring provisions as "a partial bill of rights." Letter IV from the Federal Farmer to the Republican (Oct. 12, 1787), in *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It* (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 214, ¶ 2.8.51, at 248 (Herbert J. Storing ed., 1981); see also *id.* ¶¶ 2.8.51–52, at 248–49. For greater discussion of this point, consult TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34, at 130–133.

considerable degree incorporated into our own”—specifically, “the celebrated *habeas corpus* act” of 1679.<sup>89</sup>

*D. Suspension and the Privilege in the Early American Experience*

Studying the early periods in which the Suspension Clause was, to borrow Madison’s term, “liquidated,” reveals that the same understanding of the privilege and the purpose of suspension controlled American constitutional thinking from the Founding era well through Reconstruction.<sup>90</sup> For example, during the Whiskey Rebellion, President George Washington advised his military generals that those participating in the rebellion were “to be delivered to the civil magistrates” in order to be prosecuted for their acts.<sup>91</sup> Further, “Washington . . . sought constantly to get [military leaders] to impress on their troops the necessity for proper conduct and strict observance of their roles as assistants to the civil authority.”<sup>92</sup> “He assured us,” said one chronicler of the episode, “that the army should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them.”<sup>93</sup>

During the War of 1812, President James Madison took a similar view of the limits of executive authority in the absence of a suspension, subscribing to the position that citizens suspected of aiding the British could not be held in the absence of criminal charges and could not be tried by military tribunals.<sup>94</sup> Even Thomas Jefferson, who initially ordered the military arrests of several Burr Conspiracy participants, relented in the face of Congress’s failure to pass a suspension bill and turned over the prisoners to civilian authorities for prosecution in the ordinary course.<sup>95</sup>

This widely held understanding of the habeas privilege and its relationship to suspension remained largely unchanged even during the Civil War. Thus, although President Abraham Lincoln claimed that the executive could suspend the privilege ahead of Congress, he never questioned the necessity of suspension as providing the legal imprimatur for arrests outside the criminal process—even

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89. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, at 201–02 (1830) (Marshall, C.J.).

90. See generally TYLER, *HABEAS CORPUS IN WARTIME*, *supra* note 34 (detailing the legal and political understanding of the privilege and suspension over the course of this period).

91. See ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878*, at 54–55 (1988); see also WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA’S NEWFOUND SOVEREIGNTY* 215 (2006).

92. COAKLEY, *supra* note 91, at 50; see also *id.* at 52 (recounting how Washington rejected the idea that the army would “bring offenders to a military tribunal” and instead promised that they would “merely aid the civil magistrates”) (quoting 4 JOHN C. FITZPATRICK, *DIARIES OF GEORGE WASHINGTON*, 216).

93. WILLIAM FINDLEY, *HISTORY OF THE INSURRECTION IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA IN THE YEAR 1794*, at 179 (Samuel Harrison Smith ed., 1796).

94. For additional details, see Tyler, *The Forgotten Core Meaning of the Suspension Clause*, *supra* note 53, at 978.

95. See *id.* at 979–86 (detailing events).

of *Confederate soldiers*.<sup>96</sup> Referring to the Suspension Clause, Lincoln wrote that the “provision plainly attests the understanding of those who made the constitution that . . . [the] purpose” of suspension was so that “men may be held in custody whom the courts acting on ordinary rules, would discharge.”<sup>97</sup>

Congress finally gave Lincoln the authority he had claimed for the first two years of the war by enacting suspension legislation in 1863, concurring in the President’s view that suspension was necessary to detain the disaffected outside the criminal process.<sup>98</sup> Lincoln thereafter issued another sweeping suspension in September of 1863 specifically encompassing persons held in military custody as “prisoners of war.” By this term, he surely intended to include Confederate soldiers captured on the battlefield.<sup>99</sup>

In the wake of the Civil War, suspension returned briefly during Reconstruction, when Congress authorized President Ulysses S. Grant to proclaim a suspension in order to combat the Ku Klux Klan in the South, which he did in 1871.<sup>100</sup> Thereafter, it was not until World War II that suspension reemerged as part of public debates over how to detain the suspected disloyal during times of war.

#### *E. The Development of British Habeas Jurisprudence*

Meanwhile, in the wake of American independence, British habeas jurisprudence continued to embrace a suspension model grounded in the English Habeas Corpus Act. As had long been the case, this model contemplated that the detention outside the criminal process of those within protection—a category that included British citizens as well as aliens who could claim a temporary or local allegiance—could only follow under the terms of a suspension. But with the passage of time, British practice changed course in some respects, leading to significant differences between the British and American habeas jurisprudence.

In order to understand the evolution of British habeas jurisprudence, one must recall that in Great Britain, there is no written Constitution. This is certainly

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96. See *id.* at 986–96; see also Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 637–51 (2009) [hereinafter Tyler, *Suspension as an Emergency Power*].

97. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 260, 264 (Roy P. Basler et al. eds., 1953) (internal citation omitted). Lincoln further explained the operation of the Suspension Clause as follows: “Habeas Corpus, does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the constitution on purpose that, men may be arrested and held, who can not be proved to be guilty of defined crime, ‘when, in cases of Rebellion or Invasion the public Safety may require it.’” *Id.*

98. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases of 1863, ch. 81, § 1, 12 Stat. 755, 755. For more on the details of this legislation, consult Tyler, *Suspension as an Emergency Power*, *supra* note 96, at 637–55.

99. Proclamation No. 7, 13 Stat. 734, 734 (1863). Lincoln’s proclamation also encompassed those in the United States military, military deserters, and draft dodgers.

100. See Ulysses S. Grant, A Proclamation (Nov. 10, 1871), *reprinted in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4090, 4091 (James D. Richardson ed., n.p., Bureau of Nat’l Literature 1897); Ulysses S. Grant, A Proclamation (Oct. 17, 1871), *reprinted in id.* at 4093, 4095.



not to discount that such a thing as the British Constitution exists, but it is not a constitution in the American sense. Thus, in Britain, “Parliamentary sovereignty is a fundamental principle of the [unwritten] UK constitution,” a point recently reaffirmed by the United Kingdom’s Supreme Court in its Brexit decision.<sup>101</sup> Indeed, Parliament possesses “the right to make or unmake any law whatsoever.”<sup>102</sup> Because the Habeas Corpus Act was a parliamentary creation, it was always the case that Parliament could suspend the Act—as it did on many occasions—or even modify or repeal it through ordinary legislation. Until the twentieth century, when Parliament believed that the Habeas Corpus Act’s protections would obstruct the needs of national security, it turned to suspension. This practice culminated in suspensions applied to Ireland in 1866 and 1867.<sup>103</sup>

But during the World Wars and later in 1971, Parliament charted a very different course. Its actions and the subsequent diminishing of the status of the Habeas Corpus Act laid the foundation for the more permanent changes that came in 1971, when Parliament fundamentally altered the core terms of the Act through regular legislation.<sup>104</sup>

The impetus for these changes came from events surrounding the status of Ireland. Specifically, in response to the rise of Irish Republican Army and Loyalist violence, the British government declared a state of emergency and invoked the emergency powers provided for in the original laws governing the partition of Ireland in 1922.<sup>105</sup> Then, in the Courts Act of 1971, Parliament went further and repealed what was originally the seventh section of the Habeas Corpus Act. In its place, Parliament adopted legislation authorizing the temporary preventive detention of suspected terrorists, thereby establishing the foundation of the legal framework that governs in the United Kingdom today.<sup>106</sup> Under this framework, the law permits the preventive or investigative detention of suspected terrorists, whether United Kingdom citizens or not, for up to fourteen days.<sup>107</sup>

As noted, however, Parliament had already sidelined the Habeas Corpus Act during both World Wars. Never mind that the Act had once been deemed “a thing so sacred!” by its original supporters and a “second *magna carta*” by

101. R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5 at para. 43.

102. *Id.* (quoting DICEY, *supra* note 21, at 38 (8th ed.)).

103. See SIMPSON, *supra* note 17, at 3.

104. See Courts Act 1971, c. 23, § 56(4), sch. 11, pt. IV (repealing 31 Car. 2, c. 2, § 7).

105. Pursuant to those powers, the British government claimed the right to hold persons for a range of purposes and, in extreme cases, for an indefinite period upon an executive determination that internment was necessary “for securing the preservation of the peace and maintenance of order.” See *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (ser. B) 25, ¶¶ 81–84 (1978).

106. See Courts Act 1971, c. 23, § 56(4) (Eng.).

107. See Terrorism Act 2000, c. 11 (Eng.), as amended, Protection of Freedoms Act 2012 c. 9 Pt 4 § 57(1) (Eng.) (“In paragraph 36(3)(b)(ii) of Schedule 8 to the Terrorism Act 2000 (maximum period of pre-charge detention for terrorist suspects) for ‘28 days’ substitute ‘14 days.’”). The governing statutory scheme affords persons detained on this basis multiple opportunities for judicial review as well as the opportunity to consult with and be represented by counsel. See *id.*

Blackstone.<sup>108</sup> As A.W. Brian Simpson explained, “[t]he modern practice has been to pass legislation explicitly granting powers of detention in company with other emergency powers abridging civil liberty, and to attempt to exclude the regular courts from exercising any supervisory power over the executive.”<sup>109</sup> This is precisely what happened during both World Wars. Parliament’s actions during these periods functioned similarly to earlier suspensions, insofar as their effect was to repeal temporarily the protections of the Habeas Corpus Act.<sup>110</sup>

During World War I, executive detention authority followed under Regulation 14B, issued under the auspices of the Defence of the Realm Act. In the 1914 Act, Parliament granted the executive extensive authority to “issue regulations for securing the public safety and the defence of the realm.”<sup>111</sup> Issued in June of 1915, Regulation 14B expressly authorized the detention of British subjects of “hostile origin or associations,” and with its adoption, “the right to trial, if accused of disloyal conduct, [which] had hitherto been quite fundamental to the conception of a British citizen’s liberty” was extinguished for all those swept up within its framework.<sup>112</sup>

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Such was the backdrop for events that would transpire on both sides of the Atlantic during World War II. It is to those events to which the Article now turns.

## II.

### THE DETENTION OF BRITISH CITIZENS WITHOUT CRIMINAL CHARGES DURING WORLD WAR II

In the face of the German threat and the looming Second World War, it did not take long for Parliament once again to grant the executive extensive wartime detention authority.

#### A. *Detentions Under Regulation 18B*

The events leading up to the internment of suspected enemies and the disloyal in Great Britain during World War II ran a similar course to those that

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108. 1 WILLIAM BLACKSTONE, COMMENTARIES 133\*; 9 DEBATES OF THE HOUSE OF COMMONS, *supra* note 53, at 131 (remarks of Sir Thomas Clarges); *see id.* at 268 (“We have had a struggle for [the Habeas Corpus Act] . . . and now, upon suggested Necessities, to dispense with this Law!”).

109. SIMPSON, *supra* note 17, at 3.

110. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 230 (9th ed. 1939). To be sure, there are important distinctions that may be drawn between the suspensions of the past and the approaches taken during the World Wars. The larger point, however, is that in both contexts, extensive detention outside the criminal process resulted.

111. Defence of the Realm (Consolidation Act) of 28 November 1914, 5 Geo. V, c. 8 (1914).

112. SIMPSON, *supra* note 17, at 12, 14. For extensive details on Regulation 14B and its implementation, *see id.* at 12–33; *see also id.* at 12–13 (replicating Regulation’s terms). Among other things, Simpson noted that Regulation 14B ran for eight years, well past the formal end of the war, *see id.* at 5, and that it arose out of the delegation of authority by Parliament that resulted in the adoption of Regulation 14B through Orders in Council. *Id.* at 6.

unfolded in the United States. To begin, as in the United States, the first targets of emergency detention authority in Great Britain at the outset of the war were enemy aliens. The government initially planned to detain all enemy aliens. Instead, it interned some 28,000 of the approximately 70,000 enemy aliens present in Great Britain, an amount almost three times the nation's the normal prison population during this period.<sup>113</sup>

On the eve of the Battle of Britain, Prime Minister Winston Churchill sounded his enthusiasm for using any and all government powers to stamp out Fifth Column activities.<sup>114</sup> This included exercising the power to detain allegedly subversive citizens. As he stated in June of 1940:

We have found it necessary to take measures of increasing stringency, not only against enemy aliens and suspicious characters of other nationalities, but also against British subjects who may become a danger or a nuisance should the war be transported to the United Kingdom. I know there are a great many people affected by the orders which we have made who are the passionate enemies of Nazi Germany. I am very sorry for them, but we cannot, at the present time and under the present stress, draw all the distinctions which we should like to do . . . There is, however, another class for which I feel not the slightest sympathy. Parliament has given us the power to put down Fifth Column activities with a strong hand, and we shall use those powers, subject to the supervision and correction of the House, without the slightest hesitation until we are satisfied and more than satisfied that this malignancy in our midst has been effectively stamped out.<sup>115</sup>

Specifically, Churchill referenced the expanded powers that Parliament had vested in the executive to "make provision . . . for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety of the defence of the realm."<sup>116</sup>

Under the auspices of the 1939 Emergency Powers (Defence) Act, the Privy Council adopted Regulation 18B, initially in secret.<sup>117</sup> Regulation 18B in turn set in motion the detention policies that governed British citizens suspected of being

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113. For details, see GILLMAN & GILLMAN, *supra* note 19, at 5, 222 (estimating the number detained at 27,200 and noting that many were deported); SIMPSON, *supra* note 17, at 51–53, 163; *see also* GILLMAN & GILLMAN, *supra* note 19 (noting that Britain detained almost 30,000 foreigners during World War II). The power to detain enemy aliens followed under the royal prerogative. *See* SIMPSON, *supra* note 17, at 12, 52.

114. A so-called Fifth Column refers to a group of people who work to undermine a larger group of which they are a part. In this case, the reference applied to those believed to be supporting Germany and undermining the British war effort from within.

115. Parliamentary Debates, HC Vol. 361 c. 787–96 (statement of Prime Minister Churchill, June 4, 1940), *in* SIMPSON, *supra* note 17, at 163–64.

116. Emergency Powers (Defence) Act of 1939, 2 & 3 Geo. 6, c. 62, 1(2)(a) (1939).

117. For a detailed explication of the procedures by which 18B became law, consult SIMPSON, *supra* note 17, at 44–50.

under foreign influence or control or otherwise associated with and sympathetic to any power with which Great Britain was at war.<sup>118</sup>

In the Defence Act, Parliament reserved its authority to reject regulations issued under its auspices, and Parliament did so with respect to the initial version of Regulation 18B.<sup>119</sup> This spurred the adoption of an amended version of Regulation 18B, which provided:

If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.<sup>120</sup>

The regulations adopted under the Defence Act also encompassed internal checks on the government's detention practices. To begin, Regulation 18B called for the establishment of an Advisory Committee to hear challenges to detention orders as Regulation 18B came to be implemented.<sup>121</sup> Regulation 18B further required that such committee "inform [an] objector of the grounds on which the order has been made against him and . . . furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case."<sup>122</sup> Once the Advisory Committee had established four panels, a substantial number of those detained pursued relief before them.<sup>123</sup> It was not long before the panels quickly faced a backlog of cases.<sup>124</sup>

Regulation 18B also required the Home Secretary to deliver monthly reports to Parliament detailing the actions that he had taken under Regulation 18B's authority.<sup>125</sup> This the Home Secretary did on various occasions, including once in the fall of 1941, when he appeared before the Commons to "explain[] in the greatest detail his use of the powers in a particular case."<sup>126</sup>

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118. For details, see *id.*

119. See Herman Finer, *The British Cabinet, The House of Commons and the War*, 56 Pol. Sci. Q. 321, 355 (1941).

120. Defence Regulations 1939, Stat. R & O 1681, at 18B (Eng.). This version of Regulation 18B went into effect on November 23, 1939.

121. *Id.* 18B(3).

122. *Id.* 18B(5).

123. War Cabinet, Memorandum by the Home Secretary, "Custody of Persons Detained under Defence Regulation 18B," at 1–2 (July 20, 1940) TNA CAB 66/10/4 (noting that "most" of the 600 men then in custody "have made objections" to the Advisory Committee and that each panel was "under the Chairmanship of an experienced barrister").

124. See Cornelius P. Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STAN. L. REV. 238, 265–74 (1954). Great Britain also established tribunals for reviewing the cases of enemy aliens taken into custody. For details, consult GILLMAN & GILLMAN, *supra* note 19, at 42–46 (noting that early on these tribunals recommended internment in a very small percentage of cases).

125. Defence Regulations 1939, Stat. R & O 1681, at 18B(6) (Eng.).

126. Speech of Prime Minister Winston Churchill to the House of Commons (Oct. 21, 1941), in VI WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897–1963, at 6497 (Robert Rhodes James ed., 1974).

Notably, the original version of Regulation 18B had given the Home Secretary a virtual blank check in terms of deciding who to detain, permitting him to issue a detention order “if satisfied, with respect to any particular person, that with a view to prevent him from acting in any manner prejudicial to the public safety or the Defence of the Realm, it is necessary to do so.”<sup>127</sup> The amended version of Regulation 18B came about in the wake of strong reaction in Parliament to the virtually unbounded authority that the original version had vested in the Home Secretary.<sup>128</sup> Nonetheless, this significant development in the evolution of Regulation 18B wielded little influence on the manner in which the British courts later adjudicated challenges brought against 18B detentions.

In May of 1940, Parliament again amended Regulation 18B in order to reach those who were, or had ever been, members or allies of various subversive organizations.<sup>129</sup> The new version of Regulation 18B specifically targeted organizations that were “subject to foreign influence or control” and those organizations under the influence of “persons [who] have or have had associations with persons concerned in the government of, or sympathies with the system of government of, any Power with which His Majesty is at war,” where there was a “danger of the utilization of the organization for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order,” or more generally the war effort.<sup>130</sup> The newly amended Regulation was intended to be—and served as a basis for—an expansion of the Regulation 18B detention program.<sup>131</sup>

The Home Office wasted little time in arresting hundreds of suspected individuals, moving quickly in the wake of the adoption of Regulation 18B.<sup>132</sup> Those detained famously included a member of Parliament,<sup>133</sup> as well as two of Prime Minister Churchill’s cousins by marriage.<sup>134</sup> (As is explored in Part IV,

127. See Defense Regulations 1939, Stat. R. & O. 978 (amending Stat. R. & O 927). The original version of Regulation 18B went into effect on September 1, 1939, the day Germany invaded Poland.

128. See Lord Bingham of Cornhill, *The Case of Liversidge v. Anderson: The Rule of Law Amid the Clash of Arms*, 43 INT’L LAW. 33, 34 (2009). As one set of chroniclers of the period noted, “[t]he police liked 18B” in its original version, “[b]ut the government found that it had misjudged the readiness of Parliament to confer such sweeping powers on the executive, even in war.” GILLMAN & GILLMAN, *supra* note 19, at 121. Thus, “[t]here were vehement protests, and after consulting MPs of all parties, the Home Office modified Regulation 18B considerably.” *Id.*

129. Defence Regulations 1940, Stat. R. & O. 770. This version of 18B went into effect on May 22, 1940.

130. *Id.*

131. For details, see SIMPSON, *supra* note 17, at 172–74.

132. See *id.* at 163–91.

133. See ANDREW ROBERTS, CHURCHILL: WALKING WITH DESTINY 538 (2018) (noting that the government took Archibald Maule Ramsay, a Conservative MP, into custody shortly after Regulation 18B went into effect); War Cabinet, Memorandum by the Home Secretary, “Members of the British Union Detained Under Regulation 18B,” at 2 (Sept. 7, 1944) TNA CAB 66/55/5 (discussing the case of Captain Ramsay, M.P., who was detained under 18B) (on file with author).

134. See ROBERTS, *supra* note 133, at 538 (noting that the government took Diana Mosley and George Pitt-Rivers into custody shortly after Regulation 18B went into effect and that the two were

this highlights the fact that those swept up in the detentions included persons who were not ethnically or socially removed from those in power.<sup>135</sup>) With the expansion of Regulation 18B in May of 1940, 18B detention orders primarily targeted members of the British Union of Fascists, but others as well.<sup>136</sup> In particular, the Home Secretary reported in November 1941 that his office had wielded Regulation 18B to detain “members of the I.R.A., persons who have obtained or tried to obtain secret information, persons who have tried or planned to get in touch with the enemy, persons who have committed or planned acts of sabotage, persons who have tried to slow down production, and so on.”<sup>137</sup> He also reported that all such persons “are believed to have been guilty of committing or preparing to commit criminal offences, though criminal proceedings are impracticable or for some substantial reason inexpedient.”<sup>138</sup>

In total, the Home Office executed at least 1,800 detention orders against British citizens.<sup>139</sup> Still more “were detained abroad in British dependencies under local versions of the regulations, and moved to Britain under Regulation 18A.”<sup>140</sup> Detentions reached their height in the summer of 1940 after the expanded version of Regulation 18B went into effect and when, according to a later report of the Home Secretary, the government had increased the number of detainees “by some 1,300 people.”<sup>141</sup> With each year that the war continued, however, the number of detainees dropped precipitously, falling to under one

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cousins of Churchill’s wife Clementine, a fact that reportedly “piqued” the Prime Minister) (quoting Churchill’s Secretary John Colville); SIMPSON, *supra* note 17, at 217.

135. Indeed, for a time, Churchill received weekly lists of so-called “Prominent Persons” detained under Regulation 18B. *See* SIMPSON *supra* note 17, at 214–15. And as A.W. Brian Simpson noted, “[t]he appearance of [his] two cousins in the Home Office lists may have brought home to Churchill the reality of the action he had supported.” *Id.* at 218.

136. *See generally id.*; *see also* War Cabinet, Memorandum of the Home Secretary, “Should Detention Orders be Made Under Defence Regulation 18B Against Certain Persons Carrying on Prejudicial Propaganda,” at 1 (Nov. 14, 1941) TNA CAB 66/19/40 (noting that “[m]ost of the persons who have been detained under [Regulation 18B] are persons connected with the British Union or persons of hostile origin or associations”) (on file with author) [hereinafter “Should Detention Orders be Made Under Defence Regulation 18B”].

137. “Should Detention Orders be Made Under Defence Regulation 18B,” *supra* note 136, at 1–2.

138. *Id.* at 1–2. The Home Secretary also declared that “[t]he general principle which the Home Office follows is that, if . . . criminal proceedings can be taken, they should be taken, and that only if there are good reasons against a prosecution should use be made of the power to detain by administrative order . . .” *Id.* at 1.

139. For details of the experience of detention, *see* SIMPSON, *supra* note 17, at 230–57.

140. *Id.* at 222.

141. War Cabinet, Memorandum of the Home Secretary, “Accommodation for Married Couples Detained Under Defence Regulation 18B,” at 1 (Nov. 21, 1941) TNA CAB 66/20/1 (on file with author). The same report noted that “[d]uring the first nine months of the war, all persons detained under [Regulation 18B] were accommodated in prison establishments because this was the only accommodation available.” But because the government policy was that “detention of such persons is preventive and custodial in character, and not in any way punitive,” the Home Office moved to establish special camps for the detainees. *Id.* Eventually, by the summer of 1941, “the bulk of the persons detained under the Regulation were transferred to the Isle of Man,” where they lived in two camps. *Id.*

hundred by 1944.<sup>142</sup> This followed for many reasons, including the reassessment of existing cases by MI5 and the Home Office.<sup>143</sup> It was only due to an Order in Council that Regulation 18B lapsed on the day following VE Day.<sup>144</sup> As is discussed below, the declining use of Regulation 18B corresponded in large measure with Prime Minister Churchill's change of heart with respect to the detention program.

*B. Challenging 18B Detentions Before the Advisory Committee and the Courts*

Under Regulation 18B, the Home Office bore a responsibility to constitute advisory panels to review the basis of detention orders, which the Home Secretary did soon after Regulation 18B went into effect. As the arrests mounted, those detained turned first to challenge their arrests before the Committee. In time, others sought refuge in the British courts. Although some of those detained successfully challenged their detentions before the Advisory Committee, just as during World War I,<sup>145</sup> litigants found little success in the courts.<sup>146</sup>

To begin, the Advisory Committee faced major backlogs in 1940, even though the Home Office had established four panels to review cases.<sup>147</sup> Despite the delays, evidence suggests that at times the Advisory Committee exercised its responsibility with some care. For example, it held four days of hearings in Sir Oswald Mosley's case.<sup>148</sup> This being said, in most cases, reports suggest that the

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142. See SIMPSON, *supra* note 17, at 221–22; see also *id.* at 381 (giving year-by-year statistics of drastically declining numbers). Simpson notes that by the end of April 1945, only eleven detainees remained in custody under the 18B framework, as contrasted with the over one thousand in custody in December 1940. See *id.* at 222. In a September 1944 Memorandum, the Home Secretary reported that the total number of persons detained for being associated with the British Union during the war was 747, that the number of members in custody in April 1943 had fallen to 130, and that by September 1944, the number had fallen to only fifteen. See Memorandum by the Home Secretary, “Members of the British Union Detained Under Regulation 18B,” *supra* note 133, at 1.

143. For details, see SIMPSON, *supra* note 17, at 383–88.

144. See *id.* at 408. Victory in Europe Day occurred on May 8, 1945.

145. See *King v. Halliday*, [1917] AC 260 (HL) (appeal taken from Eng.) (upholding detention of a naturalized British subject without charges pursuant to Regulation 14B of the Defence of the Realm Regulations, 1914).

146. Only one litigant successfully won his release by court order. The victory, however, was short lived, as he was arrested anew one week later. See A.W.B. Simpson, *Rhetoric, Reality, and Regulation 18B*, 3 DENNING L.J. 123, 125 (1988).

147. Memorandum by the Home Secretary, “Custody of Persons Detained under Defence Regulation 18B,” *supra* note 123, at 1–2. For extensive details on the establishment and structure of the Advisory Committee, see SIMPSON, *supra* note 17, at 82–94; 261–67. On the backlogs, see *id.* at 261–65.

148. To be sure, the Advisory Committee adjourned Mosley's hearing in the middle so that the government could shore up its case. See SIMPSON, *supra* note 17, at 276–80 (detailing the extended hearings). Mosley's case, which was extremely high profile within the Home Office, garnered intense scrutiny from Parliament and the press. See, e.g., Memorandum by the Home Secretary, “Custody of Persons Detained under Defence Regulation 18B,” *supra* note 123, at 1 (highlighting Mosley's case). A former member of Parliament, Mosley was the leader of the British Union of Fascists and taken into custody during a wave of arrests in May 1940. See SIMPSON, *supra* note 17, at 113, 117–19.

hearings were brief and mainly comprised of interrogations of the detainees.<sup>149</sup> Either way, the Advisory Committee recommended the release of a substantial number of interned persons.<sup>150</sup> But although the Home Secretary acknowledged in the summer of 1940 “the possibility that some mistakes may have been made” in ordering detentions under Regulation 18B,<sup>151</sup> he retained the authority to disregard the recommendations of the Advisory Committee, as he did on several occasions.<sup>152</sup>

In the courts, the cases of Robert Liversidge and Ben Greene most prominently challenged detention orders during the war. Both cases reached the Lords of Appeal in Ordinary that sat in the House of Lords, otherwise known as the Law Lords.<sup>153</sup> Here, the fact that Regulation 18B had been amended from its original form, arguably to impose constraints upon the Home Secretary, raised important questions as to whether the courts might enforce such limits and second-guess certain detention orders. In time, however, the Law Lords decided against such a course.

Liversidge’s case reached the Law Lords in the fall of 1941 at a particularly “low point” in the war—when “[n]ight after night London and other cities were being severely bombed.”<sup>154</sup> Adding to the drama of the case, the Lords delivered

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149. See SIMPSON, *supra* note 17, at 89–92. Further, proceedings before the Advisory Committee were informal and detainees were not permitted to question witnesses, nor were they generally permitted counsel at their hearings. See *id.*

150. For example, in one batch of cases reviewed by the Advisory Committee, it recommended release in 199 out of the 317 cases. See SIMPSON, *supra* note 17, at 293. MI5 disagreed with the recommendation of release in 111 of these same cases, see *id.*, highlighting the longstanding tension between the Home Office and MI5 on how broadly to exercise the 18B authority. For greater detail on this tension, consult generally *id.*; see also A.W. Brian Simpson, *Detention without Trial in the Second World War: Comparing the British and American Experiences*, 16 FLA. ST. U. L. REV. 225, 241–42 (1988) (noting that the Home Secretary was more inclined to accept recommendations of the Advisory Committee earlier in the war).

151. Memorandum by the Home Secretary, “Custody of Persons Detained under Defence Regulation 18B,” *supra* note 123, at 2.

152. See Note, *Civil Liberties in Great Britain and Canada during War*, 55 HARV. L. REV. 1006, 1014–15 (1942). The Home Secretary did not, however, overrule the Advisory Committee’s recommendation that Lady Domville be released. See Memorandum of the Home Secretary, “Accommodation for Married Couples Detained Under Defence Regulation 18B,” *supra* note 141, at 3. Further, in September 1944, the Home Secretary urged that all remaining cases involving the detention of British Union members be reviewed for potential release in the course of one to two months. See Memorandum by the Home Secretary, “Members of the British Union Detained Under Regulation 18B,” *supra* note 133, at 1–2. At the same time, the Home Secretary also recommended the release of Captain Ramsay, the Member of Parliament who had been detained under Regulation 18B. See *id.* at 2.

153. Of both cases, A.W. Brian Simpson asserted that the individuals “were entirely loyal.” SIMPSON, *supra* note 17, at 226. Notably, both were released shortly after the Law Lords issued their opinions in the two cases. Several other individuals filed cases in the British courts during the war challenging 18B detentions. See *id.* at 353–80 (providing details). Liversidge had changed his name from Jack Perlzweig. He was serving as a volunteer Pilot Officer in the Royal Air Force at the time of his arrest. See Bingham, *supra* note 128, at 34.

154. Bingham, *supra* note 128, at 35 (quoting Lord Bingham). As Lord Bingham also noted, this period witnessed Adolf Hitler’s expanding victories on the continent and the impending collapse of the Empire in the Far East. See *id.*



their eventual opinions in the case in the King's Robing Room rather than the Commons, which had been destroyed by German bombs.<sup>155</sup>

Liversidge had brought an action against the Secretary for false imprisonment. He argued that the court should require the Secretary to disclose the "particulars" of his "reasonable belief" that Liversidge qualified for detention, and more generally that his detention was unlawful and the government should pay him damages for false imprisonment. In response, the government argued first that under the regulatory scheme, a court could not order the Home Secretary "to give particulars," and second that "[w]hen a man is detained in pursuance of this regulation, he is deemed to be in lawful custody."<sup>156</sup>

To resolve the matter, four of the five Law Lords employed a subjective test, holding that the Home Secretary's *belief* that he had reasonable cause for suspecting Liversidge of hostile origins or association sufficed.<sup>157</sup> In so doing, the majority rejected an objective test that arguably would have called upon the courts to second-guess the Home Secretary's actions in some cases.<sup>158</sup> In other words, the court's decision declined to review the Home Secretary's exercise of discretion in any manner. It was at least partially pertinent to the majority's view that the Home Office likely made detention decisions based upon confidential information. But as one Law Lord wrote, the majority broadly subscribed to the view that "this is . . . clearly a matter for executive discretion and nothing else."<sup>159</sup>

But the majority's position did not go unchallenged. In a now-famous dissenting opinion, Lord James Richard Atkin struck a very different chord. Specifically, Atkin argued that the term "reasonably," as used throughout the common and statutory law, was almost always understood in an objective sense. As he put it, "[r]easonable cause' for an action or belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right."<sup>160</sup> It followed, in his view, that there was some role for the courts to play in scrutinizing the Secretary's asserted basis for detentions under Regulation 18B. Notably, there is evidence to support both sides of the argument over whether Parliament desired judicial enforcement of the added "reasonable cause" language in the amended Regulation,<sup>161</sup> but earlier in the war, the Attorney

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155. See Bingham, *supra* note 128, at 35.

156. *Liversidge v. Anderson and Morrison*, [1941] 2 All. ER 612, 612–13 (C.A.). Liversidge was represented by a fellow detainee who had been earlier released. See SIMPSON, *supra* note 17, at 215.

157. See *Liversidge v. Anderson*, [1942] AC 206 (HL) (appeal taken from Eng.).

158. See *id.*

159. *Id.* at 220–21 (opinion of Viscount Maugham).

160. *Id.* at 227–28; see also *id.* at 228 ("[T]his meaning of the words has been accepted in innumerable legal decisions for many generations; that 'reasonable cause' for a belief when the subject of legal dispute had been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal.").

161. A.W. Brian Simpson reported that "Home Office papers from 1941 emphasize that everyone involved in the consultations, especially the lawyers, realized that although the new regulation would limit the Home Secretary's powers, it was never intended that the judges might review detention orders on their merits, though they might be ready to interfere in extreme cases of abuse of power." SIMPSON,

General had opined that a separate category of alleged abuses of the 18B detention power likely would be subject to judicial review and rebuke.<sup>162</sup> An argument could be made, therefore, that the government would hardly have been blindsided by judicial enforcement of Regulation 18B's terms.

More generally, Atkin wrote—in words eerily similar to those used by the Supreme Court of the United States in *Ex parte Milligan* just after the Civil War<sup>163</sup>—that “[i]n this country, amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace.”<sup>164</sup> He continued:

It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.<sup>165</sup>

Lord Atkin knew his history, for here he referred to the unstable period of Charles I's reign that preceded the English Civil War and enactment of the English Habeas Corpus Act, when Charles I successfully defended detentions predicated upon royal command alone and the courts generally deferred to executive fiat.<sup>166</sup> Lord Atkin invoked Charles I's reign, of course, to underscore the point that the English judiciary came to play a far more robust role in checking executive detention later in the seventeenth century following adoption of the English Habeas Corpus Act.<sup>167</sup>

Unsurprisingly, the *Liversidge* case received extensive coverage in the press. The decision was so controversial that the author of the lead majority opinion penned a letter to the press following delivery of the case defending and

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*supra* note 17, at 65. He also reported, however, that some members of Parliament involved in the lead-up to the amendments claimed later that the new language was intended to give an aggrieved individual “the right to go to the High Court and challenge the Minister's action, and it is then incumbent on the Minister to prove to the court that he has indeed and in fact acted reasonably.” *Id.*

162. See Memorandum of the Home Secretary, “Should Detention Orders be Made Under Defence Regulation 18B Against Certain Persons Carrying on Prejudicial Propaganda,” *supra* note 135 (appending “Note by the Attorney-General”) (“If action was taken in [a] case [involving one taken into custody based solely on propaganda], and the man sought to challenge it by habeas corpus proceedings, his line would be that the acts . . . were not ‘acts prejudicial’ within the meaning of Regulation 18B. If he could satisfy the Court on this point I think he might well make out his claim.”).

163. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”).

164. See *Liversidge*, AC 206 at 244. Justice Stephen Breyer recently relied upon this passage in a dissenting opinion. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1885 (2017) (Breyer, J., dissenting).

165. *Liversidge*, AC 206 at 244. During the reign of Charles I, which preceded the eventual adoption of the English Habeas Corpus Act, royal command generally sufficed to sustain a detention. See Tyler, *A Second Magna Carta*, *supra* note 40, at 1955.

166. For details, see TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34, at 13–31.

167. For details and many examples, see *id.* at 13–61.

explaining the judgment.<sup>168</sup> Meanwhile, many papers wrote critically of the Law Lords' decision. The *Manchester Guardian* was among those attacking the decision, writing that the decision "leaves it clear that the Law Lords have pretty well washed their hands of any concern in the exercise of Defence Regulation 18B . . . , 'provided only that [the Home Secretary] acts in good faith.'" In other words, the paper wrote, "the field is left to him, and to him alone."<sup>169</sup>

Defenders of the decision emerged as well. They included the *London Times*, which came out strongly in support of the decision, writing that "any Judge who ordered the release of a prisoner in disregard of the Home Secretary's opinion that he was dangerous would in fact be assuming a responsibility in the sphere of national defence which can be borne only by the Executive officer answerable to Parliament."<sup>170</sup> Even today, some modern commentators have similarly criticized Lord Atkin's dissent for "fail[ing] to explain . . . at all how the supervisory role of the courts was to operate, granted the right, which he conceded, to withhold information of a confidential character."<sup>171</sup>

On the same day as they decided *Liversidge*, the Law Lords also rejected a habeas corpus challenge brought in the *Greene* case. There, the majority held that the relevant detention order alone sufficed to sustain Greene's imprisonment. Under the majority view, this meant that it would be rare, if ever, that the Home Secretary would be required to submit an affidavit justifying a particular detention.<sup>172</sup> This decision further cemented the reality that any oversight of 18B detentions would have to come from Parliament rather than the courts. Indeed, what little there was during the war came from that source.<sup>173</sup>

Perhaps it is not surprising that the courts stayed their hands in the face of Regulation 18B detention challenges. After all, many cases came before the Law Lords during the fall of 1941, which was an especially precarious point in the war for Great Britain. More generally, as the Solicitor General once wrote, one could view Regulation 18B as effectively constituting a suspension of habeas corpus, which had always been understood to preclude judicial review.<sup>174</sup> On this score, as noted earlier, the right to habeas corpus in the British tradition was (and remains) not grounded in any written constitution, but instead existed at the

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168. See G.W. Keeton, *Liversidge v. Anderson*, 5 MOD. L. REV. 162, 162 (1942); see also Bingham, *supra* note 128, at 37.

169. *Regulation 18B*, MANCHESTER GUARDIAN, Nov. 4, 1941, at 4, ProQuest Historical Newspapers: The Guardian and The Observer.

170. *War and Habeas Corpus*, LONDON TIMES, Nov. 4, 1941, p. 5, col. 3., The Times Digital Archive, CS84359524.

171. SIMPSON, *supra* note 17, at 363.

172. *Greene v. Secretary of State for Home Affairs*, [1942] AC 284 (HL).

173. See Cotter, *supra* note 124, at 274–85 (surveying parliamentary debates and noting that the Question Period was used repeatedly to seek information from the Home Office); SIMPSON, *supra* note 17, at 414 (noting that the secrecy of Regulation 18B's implementation undermined the Commons' ability to engage in oversight of the program while recognizing that "the pressure from some members must surely have had its influence in producing moderation in the use of the regulation; to this extent it is right to say that the Commons was a fairly effective watchdog").

174. See WILLIAM JOWITT, *SOME WERE SPIES* 15–16 (1954).

mercy of Parliament's power to suspend it. Thus, a different version of *Liversidge* could have construed Regulation 18B along the same lines as the Solicitor General—namely, as a suspension of the privilege.

Over time, however, Lord Atkin's dissent has garnered considerable support such that in 1980 one leading member of the House of Lords proclaimed that "the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right."<sup>175</sup> Additional discussion of *Liversidge* and the role of the judiciary in reviewing wartime detentions follows below.

### C. *The Prime Minister Becomes a Critic*

At the outset of the war, Prime Minister Churchill had been a strong supporter of aggressive tactics—including internment—directed at individuals suspected of Fifth Column activities. During debates over how to address the problem of alien enemies present in Great Britain, Churchill reportedly declared "Collar the lot!"<sup>176</sup> His support for large-scale internment of alien enemies in the absence of meaningful individual review as well as his support for their deportation—with at times tragic consequences—does not stand among his better legacies.<sup>177</sup>

But in the face of broad public support for the 18B program and against the backdrop of his original support for the same, it is significant that over the course of the war, Churchill became an increasingly staunch critic of Regulation 18B and its provision for the detention of citizens outside the criminal process. Indeed, by the fall of 1943, Churchill was celebrating "the great principle of *habeas corpus* and trial by jury, which are the supreme protection invented by the British people for ordinary individuals against the State."<sup>178</sup> Notably, in equating the concepts of *habeas corpus* and trial by jury, Churchill appeared to have fully appreciated the historic link between the concepts forged in the English Habeas Corpus Act of 1679. Churchill's later speeches and writings, moreover, reveal that he fully appreciated the significance of the Habeas Corpus

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175. Bingham, *supra* note 128, at 38.

176. GILLMAN & GILLMAN, *supra* note 19, at 153 (quoting Churchill).

177. *Id.* at 133, 219 (noting that Churchill spoke in favor of the removal of alien enemy internees out of the United Kingdom in an important meeting); *see also id.* at 185–201 (detailing the sinking of one ship full of internees being deported); *id.* at 225 (noting that, during the war, 7,350 internees were deported and 650 drowned). Early in the war, the War Department also debated deporting citizen detainees. *See* Memorandum by the Home Secretary, "Custody of Persons Detained under Defence Regulation 18B," *supra* note 123, at 2–3.

178. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 21, 1943), in 5 CHURCHILL, *supra* note 1 at 679. Earlier in the war, Churchill declared in a speech to the House of Commons that "'Habeas Corpus,' 'petitioner's right,' 'charges made which are known to the law,' and 'trial by jury'" are "all . . . a part of what we are fighting to preserve." Speech of Prime Minister Winston Churchill to the House of Commons (Oct. 21, 1941), in VI CHURCHILL, *supra* note 126, at 6497.

Act in the story of the privilege. In his famous Iron Curtain speech given in the immediate wake of the war, for example, Churchill declared:

[W]e must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence.<sup>179</sup>

Ten years later, in 1956, Churchill specifically lauded as a “monument” the “Habeas Corpus Act which confirmed and strengthened the freedom of the individual against arbitrary arrest by the executive.” Because of the Act, he continued, “wherever the English language is spoken in any part of the world, wherever the authority of the British Imperial Crown or of the Government of the United States prevails, all law-abiding men breathe freely.”<sup>180</sup>

To be sure, in the fall of 1943, Churchill still defended some executive detention outside the criminal process, arguing that “when extreme danger to the State can be pleaded . . . this power may be temporarily assumed by the Executive.”<sup>181</sup> But he cautioned that this state of affairs was appropriate “only” when such danger existed, and, even then, “its working must be interpreted with the utmost vigilance by a Free Parliament.”<sup>182</sup>

Churchill’s change of course on the wisdom of Regulation 18B nonetheless begun much earlier in the war. In fact, even as early as the fall of 1940, Churchill conveyed “increasing scepticism [sic]” to the House of Commons about the need for executive detention powers granted by Regulation 18B.<sup>183</sup> Churchill’s evolving views were consistent with his views held during his time in the Colonial Office decades earlier, when he had written on the evils of detention without trial and taken a keen interest in habeas corpus matters.<sup>184</sup> This being said, his early interventions in 18B cases were aimed solely at easing the circumstances of detention, rather than ending it outright.<sup>185</sup>

In correspondence written near the end of 1940, Churchill explained his concerns relating to the dramatic executive powers bestowed under Regulation 18B:

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179. Winston Churchill, *The Sinews of Peace, Address at Westminster College* (Mar. 5, 1946), in *SOURCES OF WORLD HISTORY* 298–302 (Mark A. Kishlansky ed., 1995).

180. 2 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES* 365–366 (1956).

181. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 21, 1943), in 5 CHURCHILL, *supra* note 1 at 679.

182. *Id.*

183. SIMPSON, *supra* note 17, at 248.

184. *See id.* at 248 n.129; *see also* CHURCHILL: A PROFILE (Peter Stansky ed., 1973) (quoting Colonial Office memoranda).

185. *See* SIMPSON, *supra* note 17, at 249. Early in the administration of Regulation 18B, Churchill angrily complained about the extended period of time that detainees were imprisoned rather than interned. He also argued for permitting married couples to live together. *See id.*

Having been brought up on the Bill of Rights, *habeas corpus*, and trial by jury conceptions, I grieved to become responsible, even with the constant assent of Parliament, for their breach. In June, July, August, and September our plight had seemed so grievous that no limits could be put upon the action of the State. Now that we had for the time being got our heads again above water, a further refinement in the treatment of internes seemed obligatory.<sup>186</sup>

Echoing these themes, in October 1941, Churchill gave a speech to the House of Commons in which he stated that:

There is no part of the powers conferred on [the executive] in this time of trial that I view with greater repugnance than these powers of exceptional process against the liberty of the subject without the ordinary safeguards which are inherent in British life . . . all [of which] are part of what we are fighting to preserve.<sup>187</sup>

Such powers, Churchill opined, should never be invoked except for “self-preservation” of the state.<sup>188</sup> And, by the end of 1941, Churchill declared that the powers vested in the executive by Regulation 18B should “be abandoned as soon as possible.”<sup>189</sup>

In 1943, Churchill turned completely against Regulation 18B, admonishing in a now-famous passage that “[t]he power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement of his peers, is in the highest degree odious and is the foundation of all totalitarian government.”<sup>190</sup> Thus, Churchill now urged the repeal of Regulation 18B, counseling “strongly” that “such powers . . . are contrary to the whole spirit of British public life and British history.”<sup>191</sup> As he

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186. Letter from Prime Minister Winston Churchill to Aircraft Production (Dec. 22, 1940), in WINSTON S. CHURCHILL, *THEIR FINEST HOUR* app. at 703 (1949). In a separate letter to the Home Secretary written the same day, Churchill wrote that “[i]t must be remembered that these political *détenus* are not persons against whom any offence is alleged, or who are awaiting trial or on remand. They are persons who cannot be proved to have committed any offence known to the law, but who because of the public danger and the conditions of war have to be held in custody.” Churchill went on to lament that he felt “distressed at having to be responsible for action so utterly at variance with all the fundamental principles of British liberty, *habeas corpus*, and the like.” See Letter from Prime Minister Winston Churchill to Home Secretary John Anderson (Dec. 22, 1940), in *id.*, app. at 703; see also *id.* (“The public danger justifies the action taken, but that danger is now receding.”).

187. Speech of Prime Minister Winston Churchill to the House of Commons (Oct. 21, 1941), in VI CHURCHILL, *supra* note 126, at 6497.

188. *Id.* (“[W]e are determined that they shall not be trespassed upon by anything except the need of self-preservation which arises in time of war.”).

189. SIMPSON, *supra* note 17, at 378 (describing what Churchill said in a War Cabinet meeting).

190. See Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 21, 1943), in 5 CHURCHILL, *supra* note 1. Interestingly, earlier, Churchill had rejected any criticism of the 18B program as “adopting the methods of Fascist States,” asserting that so long as Parliament wielded control over executive detention, such a comparison was categorically improper. Speech of Prime Minister Winston Churchill to the House of Commons (Oct. 21, 1941), in VI CHURCHILL, *supra* note 126, at 6497–98.

191. Cable from Prime Minister Winston Churchill to Deputy Prime Minister Clement Attlee and Home Secretary Herbert Morrison (Nov. 25, 1943), in 5 CHURCHILL, *supra* note 1, at 680.

wrote to his wife Clementine during this period: "I am burning to take part in the debate on 18B, and if I were at home now I would blow the whole blasted thing out of existence."<sup>192</sup>

At the time, Churchill recognized that his position went against the tide of popular and political support for the government's detention policies,<sup>193</sup> but he nevertheless urged his Home Secretary to promote the repeal of Regulation 18B. In a powerful letter, Churchill advised him that "[p]eople who are not prepared to do unpopular things and to defy clamour are not fit to be Ministers in times of stress."<sup>194</sup> Finally, in a passage that underscores Churchill's contemporary recognition of the historical precedent that his administration was establishing, he counseled the Home Secretary that "[a]ny unpopularity you have incurred through correct and humane exercise of your functions will be repaid in a few months by public respect."<sup>195</sup>

As will be discussed below, Churchill's approach to such matters stands in considerable tension with that of his American counterpart.

### III.

#### THE UNITED STATES EXPERIENCE: SUSPENSION AND MARTIAL LAW IN THE HAWAIIAN TERRITORY, EXCLUSION ORDERS AND INTERNMENT CAMPS ON THE MAINLAND

Across the Atlantic, the United States also witnessed the detention of citizens during World War II. It did not take long once the country entered the war.

Everything began with the bombing of Pearl Harbor on December 7, 1941. Congress declared war on Japan the next day and on Germany three days after that.<sup>196</sup> The bombing also set off a dramatic chain of events in both the Hawaiian Territory and on the mainland. In its immediate wake, suspension and martial law came to rule in Hawaii. Meanwhile, over the next few months, on the West Coast of the mainland the military imposed curfews, designated huge military areas of exclusion, and ultimately created "relocation centers" throughout the region. Altogether, these efforts sought to control the movements of, and in time

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192. Letter from Prime Minister Winston Churchill to Clementine Churchill (Nov. 26, 1943), in *WINSTON AND CLEMENTINE: THE PERSONAL LETTERS OF THE CHURCHILLS* 487 (Mary Soames ed., 1999). Churchill wrote to his wife from Cairo.

193. For example, as A.W. Brian Simpson observed, "as late as 1944, the number of members of the Commons prepared to vote for rethinking the system [Regulation 18B] which had kept one of their colleagues in detention for four years on unrevealed grounds was only a miserable thirty-one." SIMPSON, *supra* note 17, at 416.

194. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 29, 1943), in 5 *CHURCHILL*, *supra* note 1, at 681.

195. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 25, 1943), in 5 *CHURCHILL*, *supra* note 1, at 680.

196. See Pub. L. 77-328, 55 Stat. 795 (Dec. 8, 1941) (declaring war on Japan); Pub. L. 77-331, 55 Stat. 796 (Dec. 11, 1941) (declaring war on Germany).

involuntarily intern, approximately 120,000 persons of Japanese ancestry.<sup>197</sup> Those interned under military orders during this period included over 70,000 United States citizens.<sup>198</sup>

The government's response to Pearl Harbor was swift and extensive, initially focusing on circumstances in the Hawaiian Territory and alien enemies throughout the United States. As to the latter, within twenty-four hours of the bombing, President Roosevelt had issued proclamations designating Japanese, German, and Italian citizens inside the United States to be "alien enemies" and subjecting those "deemed dangerous to the public peace or safety of the United States" to "summary apprehension."<sup>199</sup> In the days that followed, the government arrested hundreds of aliens.<sup>200</sup> By February 1942, almost three thousand Japanese aliens had been detained on the mainland and in the Hawaiian Territory under this authority.<sup>201</sup>

#### A. The Hawaiian Territory

In Hawaii, meanwhile, the military quickly took control of the territory and declared a suspension and martial law, a state of affairs that lasted through much of the war. In the years that followed, the policies that unfolded in Hawaii pushed the boundaries of Suspension Clause jurisprudence and revisited the Civil War debates over the scope of martial law and the propriety of military trials of civilians.

In the hours following the attack on Pearl Harbor, Hawaiian Territorial Governor Joseph Poindexter declared martial law and suspended the privilege of the writ of habeas corpus in the Territory "until further notice."<sup>202</sup> Poindexter

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197. See MILTON S. EISENHOWER, *THE PRESIDENT IS CALLING* 125 (1974).

198. See *Educator Resources: Japanese Relocation During World War II*, THE NATIONAL ARCHIVES, <https://www.archives.gov/education/lessons/japanese-relocation> [<https://perma.cc/Z6Y7-RGPL>] (putting the total number of those detained at 117,000 and the number of citizens at 70,000).

199. Proclamation No. 2525, 6 Fed. Reg. 6321, 6323 (Oct. 10, 1941); Proclamation No. 2526, 6 Fed. Reg. 6323 (Dec. 10, 1941); Proclamation No. 2527, 6 F.R. 6323 (Dec. 8, 1941). War Department instructions expanded those subject to the proclamations to dual citizens in Hawaii. See Harry N. Scheiber, Jane L. Scheiber & Benjamin Jones, *Hawai'i's Kibei Under Martial Law: A Hidden Chapter in the History of World War II Internments*, 22 W. LEGAL HIST. 1, 19 n.56 (2009) (citing Adams (War Department) to Commanding General, Fort Shafter, radiogram, Dec. 11, 1941, U.S. District Court case no. 730, exhibit C, RG 21, National Archives, San Bruno, CA).

200. Letter from Federal Bureau of Investigation Director J. Edgar Hoover to Presidential Secretary Major General Edwin M. Watson (Dec. 10, 1941), President's Official File 10-B: Justice Department; FBI Reports, 1941; Box 15, (Franklin D. Roosevelt Presidential Library [hereinafter "FDR Library"]) (including maps detailing FBI arrests of 1,212 Japanese, 620 German, and 98 Italian aliens); see also ANNUAL REPORT OF THE ATTORNEY GENERAL FOR FISCAL YEAR ENDED JUNE 30, 1942, at 14 (1943) (reporting that 2,971 enemy aliens were taken into custody in the early weeks of the war).

201. See PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 19 (1983); ANNUAL REPORT, *supra* note 200, at 14 (discussing arrests during this period).

202. Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477 app. 1 at 507 (1943) (reprinting the full text of the Governor's Proclamation).



claimed the authority to do so under the Hawaiian Organic Act of 1900, which gave the territorial governor standing authority to suspend the privilege “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it.”<sup>203</sup> The Hawaiian Organic Act also granted the governor authority to “place the Territory, or any part thereof, under martial law.”<sup>204</sup> Further, any suspension or declaration of martial law would remain in effect “until communication [could] be had with the President and his decision thereon made known.”<sup>205</sup> President Roosevelt quickly approved the governor’s actions.<sup>206</sup>

Following the governor’s proclamation, the military took over all governmental affairs in Hawaii, including the courts.<sup>207</sup> “Trial by jury and indictment by grand jury were abolished,”<sup>208</sup> and military tribunals held all criminal trials, continuing to do so even after civilian courts reopened to hear most other matters.<sup>209</sup> Under the suspension, “suspected citizens were rounded up and placed in a local inter[n]ment camp,” without formal hearings and without charges.<sup>210</sup> As the Supreme Court noted in its post-war decision, *Duncan v. Kahanamoku*:

The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney.<sup>211</sup>

Earlier military orders similarly prohibited courts from reviewing habeas petitions.<sup>212</sup>

Nonetheless, the United States District Court for the Territory of Hawaii decided several notable habeas cases during the war. Two categories of

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203. Ch. 339, § 67, 31 Stat. 141, 153.

204. *Id.*

205. *Id.* For more details, consult *Duncan v. Kahanamoku*, 327 U.S. 304, 307–08 (1946) and Anthony, *supra* note 202.

206. See *Duncan*, 327 U.S. at 308 & n.2; *id.* at 348 (Burton, J., dissenting); Anthony, *supra* note 202, at 478 (detailing communications between Poindexter and Roosevelt).

207. See Anthony, *supra* note 202, at 481.

208. *Id.* Garner Anthony served as Attorney General of Hawaii during the war; he later challenged the validity of martial law in Hawaii before the Supreme Court in the *Duncan* case, detailed below.

209. As the Ninth Circuit noted during this period, “because of the prohibition against the assembling or empaneling of juries [the courts] were wholly disabled from trying criminal cases in the constitutional sense.” *Ex parte Duncan*, 146 F.2d 576, 579 (9th Cir. 1944).

210. See Anthony, *supra* note 202, at 503 (noting that the hearings “apparently consist[ed] of reports of investigations and cross examination of the suspected individuals,” and “[t]he proceedings [were] secret”). For more details on the detentions, see Scheiber, Scheiber & Jones, *supra* note 199, at 24–38, 67–68. For an extensive discussion of conditions in Hawaii during the war, see HARRY N. SCHEIBER & JANE L. SCHEIBER, *BAYONETS IN PARADISE: MARTIAL LAW IN HAWAII DURING WORLD WAR II* (2016).

211. *Duncan*, 327 U.S. at 309.

212. See, e.g., Robert S. Rankin, *Hawaii Under Martial Law*, 5 J. POL. 270, 27475 (1943) (quoting General Orders No. 29 (Dec. 16, 1941), that banned circuit courts from issuing writs of habeas corpus).

petitioners sought habeas relief during this period. The first comprised those arrested for so-called “subversive” activities who were then detained by military authorities without criminal charges. The second encompassed persons who were tried and sentenced by military courts during the war. In both contexts, petitioners argued that the military’s exercise of emergency powers transgressed the Constitution, the Hawaiian Organic Act, or both.<sup>213</sup> These cases are noteworthy given that, despite considerable disagreement over the merits of whether the government’s wartime policies were legal and justified, not one of the several federal courts to review these cases—including the Supreme Court—ever questioned its jurisdiction to second-guess the actions of the political branches where appropriate.<sup>214</sup>

The one case that made its way to the Supreme Court from Hawaii, *Duncan v. Kahanamoku*, is significant in this regard. Discussed extensively below, *Duncan* held unlawful the government’s declaration of martial law in the Hawaiian Islands and ultimately vacated the convictions of two civilians who had been tried by a military commission for embezzlement and assault. But *Duncan* was decided after the war—a fact that likely influenced the Court’s willingness to second-guess the government’s wartime decisions. In all events, there are several other matters to discuss before returning to *Duncan*, and for that we turn to the mainland.

#### B. Executive Order 9066

In the weeks following the bombing of Pearl Harbor, internal debates among key government officials quickly laid the groundwork for Executive Order 9066, which President Roosevelt issued on February 19, 1942.<sup>215</sup> The order, signed ten weeks after the Japanese attack, authorized the Secretary of War to designate military zones “from which any or all persons may be excluded” and regulate the terms by which persons could enter, remain in, or be forced to leave such areas.<sup>216</sup> By its own terms, 9066 included no language specifically targeting a particular race or ethnicity, or specifically mentioning detention.<sup>217</sup> But it set in motion the massive detention of approximately 120,000 persons of Japanese ancestry—including over 70,000 American citizens—in the western United States. Their internment stands as the most egregious violation of the Suspension Clause in American history. The story, as one historian put it, is nothing short of a “tragedy of democracy . . . . By arbitrarily confining American citizens of Japanese ancestry, the government violated the essential

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213. For details on these cases, see TYLER, *HABEAS CORPUS IN WARTIME*, *supra* note 34, at 212–22.

214. For additional discussion of the cases and the justiciability debate, see *id.*; Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

215. 3 C.F.R. § 1092 (1942) (repealed 1976).

216. *Id.* This Section relies heavily on the interviews and extensive archival sources identified in the work of Morton Grodzins, Peter Irons, and Greg Robinson.

217. 3 C.F.R. § 1092.

principle of democracy: that all citizens are entitled to the same rights and legal protections.”<sup>218</sup>

Notably, leading up to and following the issuance of 9066, many key participants in internal government debates expressed great skepticism over whether any evidence existed to support suspicions of widespread disloyalty on the part of persons of Japanese ancestry living in the United States. These doubts carried over to the wisdom of evacuation and internment policies directed at Japanese Americans. Indeed, just days before the issuance of 9066, a key War Department official acknowledged that “no one has justified fully the sheer military necessity for such action.”<sup>219</sup> Similarly, at a meeting that took place in the early days of February 1942 between high-ranking War Department and Justice Department officials—including Attorney General Francis Biddle—the Justice Department officials remarked that “there is no evidence whatsoever of any reason for disturbing citizens.”<sup>220</sup> Going further, they proposed a joint departmental statement that “the present military situation does not at this time require the removal of American citizens of the Japanese race.”<sup>221</sup> (Reports from Federal Bureau of Investigation Director J. Edgar Hoover, concluding that a lack of evidence of disloyal activity failed to justify relocation proposals, surely influenced Biddle’s position.<sup>222</sup>) Subsequently, on February 7, 1942, Biddle informed the President that his department “believed mass evacuation at this time inadvisable,” and that “there were no reasons for mass evacuation.”<sup>223</sup> Biddle further “emphasized the danger of the hysteria” that was so prevalent in the West “moving [E]ast.”<sup>224</sup> The hysteria to which Biddle referred manifested itself in many ways, including western politicians pushing for mass evacuation and detention of Japanese Americans and anti-Japanese animus on the ground in western states grounded in racial and economic factors.<sup>225</sup>

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218. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 5–6 (2001).

219. Memorandum, “Alien Enemies on the West Coast (and Other Subversive Persons),” from Major Karl R. Bendetsen, assistant to the Judge Advocate General, to Major General Allen W. Gullion, Provost Marshal General, Feb. 4, 1942, at 4, in *Documents of the Committee on Wartime Relocation and Internment of Civilians* 5945, 5948, reel 5, at 588 (Frederick, MD, University Publications of America 1983). As Peter Irons has noted, just days later, the same official drafted a final recommendation to Commanding General of the Western Defense Command John L. DeWitt that DeWitt adopted, asserting that mass evacuation was required “by military necessity.” IRONS, *supra* note 201, at 50; see LIEUTENANT GENERAL JOHN L. DEWITT, *FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942* (submitted Feb. 14, 1942).

220. Transcript of Telephone Conversation, Bendetsen, Gullion, and Clark, *supra* note 3, at 1 (statement of General Gullion) (describing the meeting).

221. *Id.*

222. See FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 221–24 (1962) (discussing reports that Biddle had received from Hoover); see also ROBINSON, *supra* note 218, at 100.

223. Attorney General Francis Biddle, Memorandum, “Luncheon Conversation with the President” (Feb. 7, 1942), at 2, Box 3, Roosevelt, Franklin D. Correspondence Folder, Francis Biddle Papers, (FDR Library).

224. *Id.*

225. See, e.g., JEFFERY F. BURTON ET AL., *CONFINEMENT AND ETHNICITY, AN OVERVIEW OF WORLD WAR II JAPANESE AMERICAN RELOCATION CAMPS* 27 (2002) (detailing the discrimination

Initially, General DeWitt, who held the post of Commanding General of the Western Defense Command—and who would soon promote and oversee the evacuation and internment policies on the West Coast—had his own doubts about the merits of internment. He rejected the idea as a departure from “common sense” and likely to “alienate the loyal Japanese.”<sup>226</sup> He also recognized that American citizens were legally distinct from Japanese nationals, who were enemy aliens under traditional wartime policies. In fact, during early debates with the army’s provost marshal general over the merits of an internment policy, DeWitt emphasized: “An American citizen, after all, is an American citizen.”<sup>227</sup> Of course, these statements stand in stark contrast to reports that DeWitt soon pushed for evacuation policies targeting Japanese Americans<sup>228</sup> and to his final recommendations to the President, delivered on February 13, 1942, that declared: “The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.”<sup>229</sup>

As the push to intern persons of Japanese ancestry—aliens and citizens alike—gained momentum, Biddle repeatedly argued that no internment of citizens could occur without a suspension of the privilege of the writ of habeas corpus.<sup>230</sup> Responding to a letter from Representative Leland M. Ford of California advocating that “all Japanese, citizens or not, be placed in inland concentration camps,”<sup>231</sup> Biddle wrote “unless the writ of habeas corpus is suspended, I do not know any way in which Japanese born in this country, and therefore American citizens, could be interned.”<sup>232</sup> This statement is remarkable

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faced by Japanese immigrants and Japanese Americans in the West and noting that “[m]any of the anti-Japanese fears [in the West] arose from economic factors combined with envy, since many of the Issei farmers had become very successful at raising fruits and vegetables in soil that most people had considered infertile”). As things unfolded, “[m]ost families sold their property and possessions for ridiculously small sums,” allowing those who remained to buy such property for a song. *See id.* at 33.

226. IRONS, *supra* note 201, at 29 (quoting Transcript of Telephone Conversation, Commanding General of the Western Defense Command John L. DeWitt and Provost Marshal General of the US Army Major General Allen W. Gullion, Dec. 26, 1941) (internal quotation marks omitted) (reporting DeWitt to have said: “If we go ahead and arrest the 93,000 Japanese [in California], native born and foreign born, we are going to have an awful job on our hands and are very liable to alienate the loyal Japanese,” and “I’m very doubtful that it would be common sense procedure” to detain the Japanese American population).

227. *Id.* at 30 (quoting Transcript of Telephone Conversation, DeWitt and Gullion, *supra* note 226) (internal quotation marks omitted). Additional examples of DeWitt’s earlier reluctance over internment proposals are detailed in BIDDLE, *supra* note 222, at 215.

228. Diary of Secretary of War Henry L. Stimson (Feb. 3, 1942), reel 7 at 85 (Henry L. Stimson Papers, Yale University Library).

229. JOHN L. DEWITT, *supra* note 219, at 34.

230. Biddle was a Harvard-trained lawyer and the son of a law professor.

231. Letter from Representative Leland Ford to Attorney General Francis Biddle (Jan. 23, 1942), Japanese-American Evacuation and Resettlement Records, reel 1 (Bancroft Library, University of California, Berkeley).

232. Letter from Attorney General Francis Biddle to Representative Leland Merritt Ford (Jan. 24, 1942), *reprinted in* Documents of the Committee on Wartime Relocation and Internment of Civilians, *supra* note 219 at 5739, 5740, reel 5, at 417–18; *see also* BIDDLE, *supra* note 222, at 215

insofar as it went against the tide inside the Roosevelt administration favoring internment and the fact that it originated from the chief law enforcement officer of the United States.

A week later, at a meeting between Justice and War Department officials, Biddle again took the position that his department “[would] have nothing whatsoever to do with any interference with citizens, whether they are Japanese or not.”<sup>233</sup> Biddle also reportedly stated in the meeting that “the Department of Justice would be through if [the War Department] interfered with citizens and [the] writ [sic] of habeas corpus.”<sup>234</sup> Biddle further declared that his Department would not “recommend the suspension of the writ of habeas corpus.”<sup>235</sup> During this same week, he also directly informed the President of his view that “American born Japanese, being citizens, cannot be apprehended or treated like alien enemies.”<sup>236</sup> But Biddle also told the President in this same memorandum that “probably an arrangement can be made, where necessary, to evacuate them from military zones.”<sup>237</sup> Likewise, he reported that a “[s]tudy [was] being made as to whether, with respect to them, the writ of habeas corpus could be suspended in case of an emergency.”<sup>238</sup>

Early on in the war, Secretary of War Henry L. Stimson also saw constitutional problems with the internment of citizens. On February 3, 1942, he wrote in his diary: “We cannot discriminate among our citizens on the ground of racial origin.”<sup>239</sup> By ordering second-generation Japanese American citizens evacuated from the western states, Stimson believed, military policies “will

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(repeating what he had written). Biddle also wrote to Ford three days later: “This Department has not deemed it advisable at this time to attempt to remove all persons of the Japanese race in to the interior of the country.” In support, Biddle cited policies already in place along with “the legal difficulties presently involved in attempting to intern or evacuate the thousands of American born persons of Japanese race, who are, of course, American citizens.” Letter from Attorney General Francis Biddle to Representative Leland Merritt Ford (Jan. 27, 1942), Japanese-American Evacuation and Resettlement Records, *supra* note 231. The archived copy of the letter includes a signature by Justice Department lawyer Edward Ennis after the notation “No intention & no plans yet to evacuating citizens.” *Id.*

233. Transcript of Telephone Conversation, Bendtsen, Gullion, and Clark, *supra* note 3, at 1 (statement of General Gullion).

234. *Id.* Biddle later wrote that citizenship was crucially important to the legal calculus, observing that Japanese American citizens’ “constitutional rights were the same as those of the men who were responsible for the program.” BIDDLE, *supra* note 222, at 213.

235. *Id.* at 217. Biddle dates the meeting on February 1, 1942. *See id.* at 216.

236. Memorandum, Attorney General Francis Biddle to President Franklin Delano Roosevelt (Jan. 30, 1942), Japanese-American Evacuation and Resettlement Records, *supra* note 231.

237. *Id.*

238. *Id.* Biddle reportedly made a similar statement at a Cabinet meeting on January 30, 1942. According to Secretary of the Interior Harold Ickes’s diary, Biddle suggested that “the time might come that there would be certain areas where the President might suspend the writ of habeas corpus.” Diary of Harold Ickes (Feb. 1, 1942), Harold Ickes Papers, reel 5 at 6303 (Library of Congress). The Department was clearly evaluating the possibility of a suspension. *See* GRODZINS, *supra* note 2, at 256 (quoting Letter from Edward J. Ennis to Director J. Edgar Hoover (Feb. 13, 1942), that noted he was “studying the uses to which a statute suspending the writ of habeas corpus might be put”).

239. Diary of Secretary Stimson (Feb. 3, 1942), Henry J. Stimson Diaries, reel 7 at 85, *supra* note 228; *id.* at 102 (Feb. 10, 1942).

make a tremendous hole in our constitutional system.”<sup>240</sup> There are additional indications, moreover, that Stimson understood the significance of the Suspension Clause as a constraint on the government’s ability to detain citizens without criminal charges. For example, in April 1942, when civil liberties groups were planning to file habeas petitions on behalf of Japanese American citizens who had been moved from Hawaii to the mainland for detention, Stimson ordered that the detainees to be returned Hawaii.<sup>241</sup> Of course, there, the government had proclaimed a suspension and martial law. Thus, in Hawaii, as Stimson phrased it, “[W]e can do what we please with them.”<sup>242</sup> Some years later, writing about the same events in his memoirs, Biddle chronicled that in the lead up to 9066, “the President had declared his unwillingness to suspend the writ of habeas corpus [on the mainland]” and had ordered the “citizen internees who had been brought over . . . returned to Hawaii.”<sup>243</sup> Likely, the President was following Stimson’s counsel.

Concerns about the constitutionality of internment, and specifically the Suspension Clause, came to the President’s attention on more than one occasion. In addition to Biddle’s words of caution, Assistant to the Attorney General James H. Rowe, Jr. wrote the following to Roosevelt’s private secretary Grace Tully on February 2, 1942:

Please tell the President to keep his eye on the Japanese situation in California . . . . There is tremendous public pressure to move all of them out of California—citizens and aliens—and no one seems to worry about how or to where. There are about 125,000 of them, and if it happens, it will be one of the great mass exoduses of history. It would probably require suspension of the writ of habeas corpus—and my estimate of the country’s present feeling is that we would have another Supreme Court fight on our hands.<sup>244</sup>

But the advice of Biddle and Rowe went unheeded by Roosevelt, who moved ahead in laying the groundwork for internment, all the while in the absence of a suspension.<sup>245</sup>

Notably, the topic of suspension extended beyond discussions among Justice Department lawyers. Conversations about how to reconcile DeWitt’s

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240. *Id.* at 102.

241. Diary of Secretary Stimson (Apr. 15, 1942), Henry L. Stimson Diaries, reel 7 at 116–17, *supra* note 228.

242. *Id.*

243. BIDDLE, *supra* note 222, at 223.

244. Memorandum from Assistant to the Attorney General James H. Rowe, Jr. to Grace Tully, Private Secretary to President Franklin Delano Roosevelt (Feb. 2, 1942), James H. Rowe, Jr. Papers, Assistant to the Attorney General Files, Alien Enemy Control Unit, Box 33, (FDR Library).

245. Some commentators have suggested that by reporting that his department was studying the possibility of calling for a suspension, Biddle may have capitulated to military demands and offered a legal roadmap to evacuation and internment. *See, e.g.,* ROBINSON, *supra* note 218, at 100 (“Biddle’s reassurance that the legal obstacles to removing citizens from restricted areas could be evaded in an emergency was an invitation to the President to ignore constitutional issues entirely.”); *see also id.* at 152–53 (providing additional details on the Hawaii discussions).

push for broad exclusion orders with constitutional concerns also arose inside the War Department. Thus, on February 3, while discussing the situation with DeWitt, Assistant Secretary of War McCloy promoted the idea that blanket exclusion orders for military areas could provide “cover . . . with the legal situation.”<sup>246</sup> More specifically, McCloy argued that the Constitution posed no problem with respect to excluding both citizens and aliens of all stripes from military areas.<sup>247</sup> Such orders, he argued, could be issued “without suspending writs of Habeas Corpus and without getting into very important legal complications.”<sup>248</sup> Of course, in the same conversation, he also outlined a plan to “license back into the area” those thought not to pose a danger—in his words, “[e]veryone but the Japs.”<sup>249</sup>

Almost immediately, however, McCloy dismissed his previous concerns regarding the “legal complications” to which he had referred in his conversation with DeWitt. In a contentious meeting with Biddle, McCloy reportedly responded to constitutional objections to the military’s proposals as follows: “[I]f it is a question of safety of the country, the Constitution of the United States, *why the Constitution is just a scrap of paper to me.*”<sup>250</sup>

As late as two days before the issuance of 9066, Biddle was still pushing back against proposals for mass evacuation, writing to the President that the “last advice from the War Department is that there is no evidence of imminent attack and from the F.B.I. that there is no evidence of planned sabotage.”<sup>251</sup> Referring to newspaper columnists who were by this point pushing aggressively for the evacuation and internment of persons of Japanese descent, Biddle told the President that either they “ha[ve] information which the War Department and the F.B.I. apparently do not have, or [they are] acting with dangerous irresponsibility.”<sup>252</sup>

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246. IRONS, *supra* note 201, at 47 (quoting Transcript of Telephone Conversation, Commanding General of the Western Defense Command John L. DeWitt and Assistant Secretary of War John J. McCloy (Feb. 2, 1942), RG 389, (National Archives, DC)) (internal quotation marks omitted). McCloy, like Biddle, was a Harvard-trained lawyer.

247. *Id.*

248. *Id.*

249. *Id.*

250. Transcript of Telephone Conversation, Bendetsen, Gullion, and Clark, *supra* note 3, at 2 (“That is what McCloy said. But they are just a little afraid DeWitt hasn’t enough grounds to justify any [mass] movements . . .”) (statement of General Gullion) (emphasis added); *see also id.* (reporting that as of the February 4, 1942, call, Secretary Stimson was “against any mass movement”).

251. Memorandum from Attorney General Francis Biddle to President Franklin Delano Roosevelt (Feb. 17, 1942), President’s Office File 18: Navy Department, March–April 1942, Box 7, (FDR Library).

252. *Id.* Biddle referred specifically to columnists Walter Lippmann and Westbrook Pegler, the latter of whom had written that “[t]he Japanese in California should be under armed guard to the last man and woman right now and to hell with habeas corpus until the danger is over.” Walter Lippmann & Westbrook Pegler, WASH. POST, Feb. 15, 1942, at B7. Additional examples of Justice Department resistance to the proposals for evacuation and possible internment are detailed in GRODZINS, *supra* note 2, at 257–62.

In the end, the very serious legal concerns that executive branch officials had raised about exclusion and internment—including concerns grounded in questions about citizenship, race, and the Suspension Clause—all went ignored. The same may be said of the well-documented doubts of any factual basis to support exclusion or internment. In January, for example, an important report prepared for the Chief of Naval Operations by Lieutenant Commander Kenneth D. Ringle argued that the so-called “‘Japanese Problem’ [had] been magnified out of its true proportion,” and reported that “the most dangerous” were already in custody or “known” to Naval Intelligence and/or the FBI.<sup>253</sup> Reports from the FBI in early February found even less reason to suspect Japanese espionage on western shores.<sup>254</sup> And FBI Director Hoover—himself no stranger to robust surveillance—believed that the push for internment was “based primarily upon public and political pressure rather than on factual data.”<sup>255</sup>

In issuing 9066 and the military regulations that followed under its auspices, the President and military officials simply ignored these concerns. The results are best explained as following from the mindset held by McCloy and surely others that the Constitution was merely a “scrap of paper,” readily dismissed in the face of perceived threats to the nation.<sup>256</sup> More generally, the developments leading up to and following the issuance of 9066 demonstrated the administration’s disposition to defer to the military on all fronts.<sup>257</sup>

By the evening of February 17, 1942—just over two months after the attack on Pearl Harbor—Biddle had capitulated and given his “informal approval . . . after a personal conference with the Secretary of War” for what became 9066, placing the entire matter within the jurisdiction of the War Department.<sup>258</sup> Describing Biddle’s change of course, Rowe later observed: “Frankly, he just folded under, I think.”<sup>259</sup> After that, things moved quickly.

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253. See Lt. Commander Kenneth D. Ringle to Chief of Naval Operations, “Report on Japanese Question” (Jan. 26, 1942), File ASW 014.311, RG 107, (National Archives, DC); see IRONS, *supra* note 201, at 202–06 (discussing Ringle Report). Ringle was the Assistant District Intelligence Officer for the Eleventh Naval District in Los Angeles.

254. See BIDDLE, *supra* note 222, at 221–22 (detailing a report that Hoover sent to Biddle on February 9 as well as similar doubts raised by the Federal Communications Commission).

255. *Id.* at 224 (quoting from a memo sent by Hoover to Biddle).

256. Transcript of Telephone Conversation, Bendetsen, Gullion, and Clark, *supra* note 3, at 2.

257. For a discussion of the role of bureaucracy in this specific context and more generally in confronting uncertainties, see Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 124 (Mark Tushnet ed., 2005).

258. Memorandum of Harold D. Smith, Director, Bureau of the Budget, for President Franklin Delano Roosevelt (Feb. 19, 1942), President’s Official File 4805: Military Areas, 1941–1942 (FDR Library).

259. James H. Rowe, interview in *The Earl Warren Oral History Project: Japanese-American Relocation Reviewed: Volume 1, Decision and Exodus* 9 (Regional Oral History Office, University of California, Berkeley 1976), [http://content.cdlib.org/view?docId=ft667nb2x8&brand=calisphere&doc.view=entire\\_text](http://content.cdlib.org/view?docId=ft667nb2x8&brand=calisphere&doc.view=entire_text) [<https://perma.cc/J6N7-JQ2E>].



Roosevelt issued 9066 two days later, declaring that “the successful prosecution of the war require[d] every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”<sup>260</sup> In addition to authorizing the War Department to designate and regulate military zones, Roosevelt further directed the Secretary of War and his military commanders “to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area . . . .”<sup>261</sup> Finally, Roosevelt authorized the Secretary of War “to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, *and other accommodations as may be necessary*.”<sup>262</sup> On March 21, 1942, Congress bolstered 9066 with Public Law 503, which declared it a criminal offense to violate any War Department restrictions or orders respecting any designated “military area or military zone.”<sup>263</sup> Congress enacted the law at the prodding of the War Department.<sup>264</sup>

In the months following the issuance of 9066, DeWitt issued a series of military orders designating military zones throughout the western United States and subjecting all alien enemies and “all persons of Japanese ancestry” in such zones to exclusion orders, curfew orders, and prohibitions on travel, among other things.<sup>265</sup> By the end of March 1942, DeWitt had also prohibited such persons from leaving military areas, a prelude to the orders that followed in May and June, including Civilian Restrictive Order No. 1 and Public Proclamation No. 8. Those orders in turn required, “as a matter of military necessity,” that “all persons of Japanese ancestry, both alien and non-alien” report to assembly centers.<sup>266</sup> Evacuees were then subject to compulsory internment “for their

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260. 3 C.F.R. 1092 (1942) (repealed 1976).

261. *Id.*

262. *Id.* (emphasis added). Later, Roosevelt established the War Relocation Authority to manage the camps. *See* Executive Order No. 9102, 3 C.F.R. 1123 (1942).

263. Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (repealed 1976).

264. *See* IRONS, *supra* note 201, at 66.

265. *See, e.g.*, Public Proclamation No. 3, 7 Fed. Reg. 2543 (Mar. 24, 1942) (establishing an 8:00 p.m. to 6:00 a.m. curfew for “all enemy aliens and all persons of Japanese ancestry” within designated military areas, limiting travel, and prohibiting possession of firearms, short-wave radios, cameras, and other items); Public Proclamation No. 4, 7 Fed. Reg. 2601 (Mar. 27, 1942) (prohibiting “all alien Japanese and persons of Japanese ancestry” from leaving Military Area No. 1).

266. *See* Civilian Restrictive Order 1, 8 Fed. Reg. 982 (May 19, 1942) (prohibiting “all persons of Japanese ancestry, both alien and non-alien,” within “assembly centers, reception centers or relocation centers” “pursuant to exclusion orders” from leaving such areas without prior written authorization); Public Proclamation No. 8, 7 Fed. Reg. 8346 (June 27, 1942) (compelling “persons of Japanese ancestry who have been evacuated from certain regions within Military Areas Nos. 1 and 2” to report to “Relocation Centers for their relocation, maintenance and supervision” and that “[a]ll . . . persons of Japanese ancestry, both alien and nonalien, . . . are required to remain within the bounds of . . . War Relocation Project Area[s]”); *see also* Civilian Exclusion Order No. 1, 7 Fed. Reg. 2581 (Mar. 24, 1942) (ordering people of Japanese ancestry in Military Area No. 1 to report to “Civil Control Stations”); Public Proclamation No. 4, 7 Fed. Reg. at 2601 (prohibiting, “as a matter of military necessity,” all those of Japanese ancestry from leaving Military Area No. 1 for “any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct”).

relocation, maintenance and supervision” in ten “War Relocation Centers” spread throughout the western states.<sup>267</sup> At each step, DeWitt provided that violations of the military orders would result in criminal penalties under Public Law 503.<sup>268</sup> Thus, under 9066, DeWitt claimed blanket authority to regulate in the name of “military necessity,” and he consistently and exclusively directed his military orders at “person[s] of Japanese ancestry, both alien and nonalien.”<sup>269</sup>

Ultimately, as a result of 9066 and DeWitt’s military orders, the military forced the many thousands of persons of Japanese ancestry on the West Coast into so-called “Relocation Centers.” The government built the centers, which were really incarceration camps, in barren and desolate areas primarily in the western states, surrounding them with barbed wire fences and armed guards at all times.<sup>270</sup> Those forced to live in the camps faced extreme conditions, little in the way of privacy, and substandard food and medical care.<sup>271</sup> It was not uncommon for the military to split families apart and send family members to different camps.<sup>272</sup> Those subject to detention were “permitted to take . . . only what they could carry.”<sup>273</sup> As a result, “they were forced to abandon their homes, farms, furnishings, cars, and other belongings or to sell them off quickly at bargain prices.”<sup>274</sup> In other words, “the vast majority of the West Coast Japanese Americans lost all their property.”<sup>275</sup>

Once relocated to the internment camps, Japanese Americans were—with very few exceptions—confined for years and for much of the war. One could not leave the camps without permission. Over the course of the war, the government granted only a fraction of those detained the right to leave. The successful few encompassed predominantly those who enlisted in the military<sup>276</sup> or secured employment in one of the few communities outside the restricted areas that were willing to accept Japanese Americans during the war. In the end, the average length of stay in the camps was nine hundred days. It was not until 1946 that the

267. Public Proclamation No. 8, 7 Fed. Reg. at 8346.

268. For discussion, see *Ex parte Endo*, 323 U.S. 283, 289 (1944).

269. Public Proclamation No. 8, 7 Fed. Reg. at 8346.

270. See IRONS, *supra* note 201, at 73–74.

271. *Id.* at 73–74 (describing the terrible conditions of the camps).

272. For example, as noted below, see *infra* text accompanying notes 301–304, after initially sending Mitsuye Endo to Tule Lake with her parents, the government moved her, but not her parents, to Topaz Camp in Utah.

273. ROBINSON, *supra* note 218, at 4.

274. *Id.* at 4–5.

275. *Id.* at 5.

276. See, e.g., COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: PART 1: RECOMMENDATIONS 3 (1983) [hereinafter PERSONAL JUSTICE DENIED, PT. 1], (discussing the release process). Japanese American units, including the 100th Infantry Battalion and the 442nd Regimental Combat Team, fought for the United States with great distinction during the war. For an overview, see Entry, Japanese Americans in military during World War II, DENSHO [http://encyclopedia.densho.org/Japanese\\_Americans\\_in\\_military\\_during\\_World\\_War\\_II](http://encyclopedia.densho.org/Japanese_Americans_in_military_during_World_War_II) [https://perma.cc/8LAZ-PFQU].

government finally resettled the last of the Japanese Americans who had been incarcerated at the camps and closed the last detention camp established to house Japanese Americans, Tule Lake.<sup>277</sup>

### C. The Supreme Court During the War

It did not take long for challenges to many facets of the military regulations in both Hawaii and on the mainland to reach the courts. Three important Supreme Court cases arose out of events on the mainland: *Hirabayashi v. United States*, *Korematsu v. United States*, and *Ex parte Endo*. Each was decided during the war. In the immediate wake of the war, the Court also decided *Duncan v. Kahanamoku*, which involved challenges to suspension and martial law in Hawaii.<sup>278</sup>

Gordon Hirabayashi's case was the first to reach the Court, in 1943. Hirabayashi was a senior at the University of Washington and a natural-born citizen whose parents had immigrated from Japan. Hirabayashi refused to register with military authorities as part of the process that would surely result in his relocation to a camp. To force a legal challenge to the regulations, he also violated the curfew order declared for the military area in which he lived. After being convicted in a civilian court for violating both military regulations, Hirabayashi argued on appeal that Congress had delegated too much authority to DeWitt and that the military orders unconstitutionally discriminated on the basis of race and ethnicity.<sup>279</sup>

A unanimous Supreme Court rejected both arguments, opining with respect to the latter:

The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.<sup>280</sup>

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277. See Entry, Tule Lake, DENSHO ENCYCLOPEDIA, [https://encyclopedia.densho.org/Tule\\_Lake](https://encyclopedia.densho.org/Tule_Lake) [<https://perma.cc/3BUT-YP3C>].

278. See 327 U.S. 304 (1946).

279. *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943) ("The questions for our decision are whether the particular restriction . . . was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.").

280. *Id.* at 101. The Court vacated a companion case to *Hirabayashi* and remanded it for resentencing on a conviction of violating a curfew order, the validity of which the Court never questioned. See *Yasui v. United States*, 320 U.S. 115 (1943).

Chief Justice Stone wrote the opinion for the Court and expressly limited the Court's holding to the curfew order.<sup>281</sup> Even in its limited form, however, the Court's holding included deeply troubling language that was dismissive of Hirabayashi's discrimination claims and sanctioned the government's actions. Specifically, the Court posited: "We cannot close our eyes to the fact, demonstrated by experience, that in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."<sup>282</sup> The Court was able to avoid questions surrounding the military orders pertaining to registration, evacuation, and internment only because Hirabayashi's sentences for his two convictions had been ordered to run concurrently.<sup>283</sup> In other words, the Court concluded that affirming the curfew violation conviction sufficed to sustain Hirabayashi's sentence.

The Supreme Court similarly deferred to the military's judgment the following year in Fred Korematsu's case. Korematsu, born and raised in Oakland, California, was also the son of Japanese immigrants and also a United States citizen. Once he defied military exclusion orders, the government successfully prosecuted him for remaining in a designated military zone. On appeal, Korematsu argued that the relevant military orders were the product of unconstitutional delegations of executive and judicial powers, that they had improperly targeted him for non-criminal purposes, and that the entire apparatus of the regulations issued under 9066 was the product of unconstitutional and invidious discrimination.

But it did not matter. Just as it had one year earlier in *Hirabayashi*, the Court deferred to the military and declined yet again to "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."<sup>284</sup> Continuing, the Court observed: "We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety."<sup>285</sup> Although opining that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions," the Court nonetheless held that "when . . . our shores are threatened by hostile forces, the

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281. *Hirabayashi*, 320 U.S. at 85 ("It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.").

282. *Id.* at 101, 105. Three Justices wrote separate concurring opinions.

283. *See id.* at 85.

284. *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

285. *Id.* Korematsu had violated Civilian Exclusion Order No. 34, which barred persons of Japanese ancestry from the area in Northern California in which he was arrested. *See* 7 Fed. Reg. 3967 (May 3, 1942).

power to protect [must prevail].”<sup>286</sup> Put most simply, deference to military judgment ruled the day.

More generally, the Court also refused to discuss the assembly centers and internment camps that had followed under the purview of 9066. Korematsu had argued—correctly, of course—that he would have been required to report to an assembly center once he had complied with the evacuation order that he violated. But the Court was determined only to discuss the legality of the evacuation order and to avoid the proverbial elephant in the room. Explaining the narrowness of its analysis, the Court observed that its task “would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . . [But] we are dealing specifically with nothing but an exclusion order.”<sup>287</sup> Concurring, Justice Frankfurter likewise declined to reach the larger issues raised in the case, while nonetheless going on record to say that the Court’s holding should not be read as “approval of that which Congress and the Executive did. *That is their business, not ours.*”<sup>288</sup>

Unlike in *Hirabayashi*, this time the majority’s position met with dissent. One such dissenter, Justice Owen Roberts, summarized the case as “convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.” Roberts further chastised the Court for “shut[ting its] eyes to reality.”<sup>289</sup> Another dissenter, Justice Frank Murphy, described the military framework operating in the West as “fall[ing] into the ugly abyss of racism.”<sup>290</sup> The final dissenter, Justice Robert Jackson, argued that the Court should not have taken up the case because its decision had created a dangerous precedent for future generations. Speaking nonetheless to the merits, Jackson reduced the principle at issue in the case to the following: “[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.”<sup>291</sup>

*Korematsu* reveals that by 1944 the Court was no longer unified in deferring to the government on wartime matters and that some Justices were prepared to address the internment directly. Nonetheless, a majority led by Justice Black (who would sound very different in *Duncan* two years later) upheld

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286. *Korematsu*, 323 U.S. at 219–20.

287. *Id.* at 223. The majority deemed it “unjustifiable to call” the camps “concentration camps with all the ugly connotations that term implies.” *Id.* Other government officials were not so reluctant. See GRODZINS, *supra* note 2, at 66.

288. *Korematsu*, 323 U.S. at 225 (Frankfurter, J., concurring) (emphasis added).

289. *Id.* at 226, 232 (Roberts, J., dissenting); *id.* at 230 (referring to the camps as “concentration camps” and “prison[s]”). Justice Roberts compared *Korematsu* to *Hirabayashi*, stating that the latter was “a case of keeping people off the streets at night.” *Id.* at 225. Earlier, Justice Roberts oversaw the Roberts Commission, which studied the Japanese attack on Pearl Harbor and issued a report. For details, see ROBINSON, *supra* note 218, at 94–96.

290. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting); see also *id.* at 240 (“[U]nder our system of law individual guilt is the sole basis for deprivation of rights.”).

291. *Id.* at 243 (Jackson, J., dissenting).

Korematsu's conviction in language that deferred extensively to the military, accepting its national security-based justifications without any second-guessing. In so doing, the Court established a precedent that, to borrow from Justice Jackson's dissent, "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>292</sup>

The Supreme Court handed down its decision in *Ex parte Endo* on the very same day as *Korematsu* in December of 1944. *Endo* finally posed a direct constitutional challenge to the detention of Japanese American citizens. Nonetheless, the Court again declined to speak to the constitutionality of the internment program, and did so despite being presented with formidable arguments grounded expressly in the Suspension Clause.<sup>293</sup>

The case arose out of the State of California's suspension of all employees of Japanese ancestry, one of whom was Mitsuye Endo. Endo, a United States citizen who had been born in California, did not speak Japanese, came from a family that did not subscribe to a Japanese language paper, and had not gone to a Japanese language school. She was also a Methodist and had a brother serving in the Pacific with the United States Army.<sup>294</sup> Endo was, in the words of her attorney James Purcell, "the ideal candidate" for preparing a habeas corpus petition on behalf of all Japanese Americans subject to the internment policy.<sup>295</sup>

Purcell, a Stanford-educated attorney practicing in San Francisco, had been brought in by the Japanese American Citizens League to challenge the suspensions of California State employees of Japanese ancestry.<sup>296</sup> But after seeing the deplorable conditions at Tanforan Assembly Center near San Francisco, he chose instead to challenge the internment policy. Having grown up at Folsom Prison, where his father was a guard, Purcell said of Tanforan: "I was unable to distinguish [it] from the prison except that the walls were barbed wire fences; more frequent gun towers; more difficulty of entering to see a client; and the convicts were better housed than my American citizen clients who were not accused of any crime."<sup>297</sup> He later reflected on that moment: "When I came out of this institution, I had determined to see what I could do about it."<sup>298</sup>

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292. *Id.* at 246. As noted, this past Supreme Court Term, the Court overruled *Korematsu* in dictum. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

293. See Opening Brief for Appellant at 16–31, *Ex parte Endo*, 323 U.S. 283 (1944) (No. 70).

294. See Letter from James C. Purcell to Peter Linzer (June 11, 1975), at 3 (on file with author).

295. *Id.*

296. See *id.*; Entry, James C. Purcell, DENSHO ENCYCLOPEDIA, <http://encyclopedia.densho.org/James%20C.%20Purcell> [<https://perma.cc/HQD6-ET3J>].

297. Letter from James C. Purcell to Peter Linzer (June 11, 1975), *supra* note 294, at 3. Along similar lines, Fred Korematsu, who spent time both in jail and in a camp, later told his daughter that "jail was better than the camp." Karen Korematsu, *When Lies Overruled Rights*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/opinion/when-lies-overruled-rights.html> [<https://perma.cc/Q4S8-3BCW>].

298. Letter from James C. Purcell to Peter Linzer (June 11, 1975), *supra* note 294, at 3.

Purcell selected Endo as the ideal petitioner after viewing the results of a questionnaire that he had distributed to the suspended California employees.<sup>299</sup> He then funded the case entirely out of his own pocket and stayed the course even in the face of threats to his person and his family.<sup>300</sup> Meanwhile, like so many others, Endo not only lost her job because of her Japanese ancestry, but she had also been forced to evacuate the military area encompassing her home in Sacramento, report to an assembly center, and submit to internment with her family at Tule Lake Camp.<sup>301</sup> Purcell filed Endo's petition for a writ of habeas corpus in July 1942.<sup>302</sup> After a lengthy stay in federal district court that ended in defeat, Purcell appealed to the United States Court of Appeals for the Ninth Circuit. During this period, the government transferred Endo to another camp in Topaz, Utah. The Ninth Circuit in turn declined to resolve her appeal, instead certifying the case to the Supreme Court for resolution.<sup>303</sup>

Endo was a determined—indeed, heroic litigant—for she endured almost two additional years in the camps to keep her habeas petition alive after turning down the government's offer of release, which was conditioned upon not returning to restricted areas on the West Coast.<sup>304</sup> Had she accepted the offer, her case would have become moot like so many other wartime habeas cases before hers. But, as she later explained: “The fact that I wanted to prove that we of Japanese ancestry were not guilty of any crime and that we were loyal American citizens kept me from abandoning the suit.”<sup>305</sup>

Endo's brief to the Court reflected the work of an attorney well-versed in the key authorities relating to suspension and martial law. Purcell relied upon important earlier Supreme Court habeas decisions in *Ex parte Bollman*, *Ex parte Merryman*, and *Ex parte Milligan*, as well as Justice Story's *Commentaries on the Constitution*, among other authorities, to argue that the President had no power to hold a citizen outside the criminal process in the absence of a suspension. Quoting extensively from *Milligan*, a case Purcell labeled as “familiar to everyone who has even a smattering of constitutional law,” Endo's brief asked:

Since the military authorities have no jurisdiction by virtue of a

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299. *See id.*

300. *See generally* BILL HOSOKAWA, NISEI: THE QUIET AMERICANS: THE STORY OF A PEOPLE 426 (1969) (quoting an interview with Purcell in which he discusses hostile public sentiment); Letter from James C. Purcell to Peter Linzer (June 11, 1975), *supra* note 294, at 3 (detailing his representation of Endo); Letter from Elizabeth Purcell to Amanda L. Tyler (Aug. 29, 2016) (on file with author).

301. *See* Entry, Mitsuye Endo, DENSHO ENCYCLOPEDIA, [http://encyclopedia.densho.org/Mitsuye\\_Endo](http://encyclopedia.densho.org/Mitsuye_Endo) [https://perma.cc/8UGY-Q852].

302. *See* Letter from James C. Purcell to Peter Linzer, *supra* note 294, at 4.

303. *See id.* at 6.

304. The government's brief to the Supreme Court alludes to this fact. *See* Brief for the United States at 3, *Ex Parte Endo*, 323 U.S. 283 (No. 70) (noting that Endo had been granted “leave clearance” but “refuse[d] to apply” for the necessary conditional permit to leave the camps). For additional details, *see* IRONS, *supra* note 201, at 102–03.

305. Letter from Mitsuye [Endo] Tsutsumi to Anne Saito Howden (June 5, 1989) (on file with author).

Presidential proclamation to *try* a civilian for an alleged offense in a district where the civil Courts are open, how much less right have they to imprison a citizen without any trial at all, when he is neither charged with, nor suspected of, any crime, and when his loyalty (as in this case), is not called into question?<sup>306</sup>

Elaborating, Endo's brief argued that only a valid congressional suspension of the privilege could render lawful the detention of citizens outside the criminal process.<sup>307</sup> Finally, Endo's brief contended that no state of martial law existed to justify the internment and more generally that "the existence of a state of war does not suspend constitutional rights."<sup>308</sup> Curiously, the government's reply brief did not even engage with Endo's Suspension Clause arguments and instead primarily recited a descriptive narrative of the military orders issued under the auspices of 9066.

As the litigation unfolded, the government recognized that Endo "[was] a loyal and law-abiding citizen."<sup>309</sup> Further, the government "concede[d] that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation."<sup>310</sup> These concessions provided a roadmap for the narrow Court opinion that followed under the pen of Justice William O. Douglas. The Court, he wrote, would "not come to the underlying constitutional issues which have been argued."<sup>311</sup> Instead of delving into the constitutional thicket, the Court held that the governing regulations required the release of Endo and other concededly loyal citizens from relocation centers because "[a] citizen who is concededly loyal presents no problem of espionage or sabotage."<sup>312</sup> Continuing, Douglas wrote that "[l]oyalty is a matter of the heart and mind, not of race, creed, or color . . . . When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."<sup>313</sup> In the end, Douglas

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306. Opening Brief for Appellant, at 1631, *supra* note 293. Joining Purcell on the brief were his law partner, William Ferriter, and Wayne Collins, the latter of whom handled *Korematsu* and thousands of renunciation cases after the war. Two amicus briefs from the local and national chapters of the American Civil Liberties Union also made Suspension Clause arguments and even went further to argue that even if Congress had enacted a suspension, it would not have been valid insofar as there was no rebellion or invasion on the mainland. *See, e.g.*, Brief of American Civil Liberties Union, Amicus Curiae, at 7, *Endo*, 323 U.S. 283 (No. 70) ("[T]here is no basis under our constitutional system for the indefinite detention of American citizens even during wartime unless charges are preferred against them under the safeguards contained in the Fifth and Sixth Amendments to the Constitution.").

307. *See* Opening Brief for Appellant, *supra* note 293.

308. *See id.*

309. *Endo*, 323 U.S. at 294.

310. *Id.* at 295.

311. *Id.* at 297.

312. *Id.* at 302.

313. *Id.* This aspect of the Court's opinion has been the subject of extensive criticism by scholars for denying any accountability for the internment policies to the relevant political actors. *See, e.g.*, Jerry



“mention[ed]” a list of constitutional provisions—including the Suspension Clause—“not to stir the constitutional issues which have been argued at the bar,” but instead to explain why the Court would “give[] a narrower scope” or reading to the governing legislation and executive orders at issue.<sup>314</sup>

In an interview some years later, Douglas claimed: “I had the desire to put it on the constitutional grounds but I couldn’t get a Court to do that.”<sup>315</sup> His notes from the Justices’ conference on the case, however, do not reference any constitutional claims and instead lay out the narrow approach that his opinion ultimately followed.<sup>316</sup> This being said, his law clerk—the first woman law clerk on the Supreme Court—had recommended to him two paths: the one of constitutional avoidance that he ultimately took and an alternative that would have held, for the first time, that the Fifth Amendment’s Due Process Clause incorporates an equal protection component that would have subjected the military regulations to anti-discrimination principles.<sup>317</sup> Nevertheless, despite the public urging of at least two justices (and likely a third)—one of whom argued that “[a]n admittedly loyal citizen . . . should be free to come and go as she pleases”<sup>318</sup>—the Court once again avoided addressing the serious constitutional issues implicated by the internment policies and instead delivered an exceedingly minimalist decision.

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Kang, *Watching the Watchers: Enemy Combatants in the Internment’s Shadow*, 68 L. & CONTEMP. PROB. 260, 267–74 (2005).

314. *Endo*, 323 U.S. at 299 (applying a clear statement rule).

315. Transcriptions of Conversations Between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 8 (May 23, 1962), <https://findingaids.princeton.edu/collections/MC015/c09> [<https://perma.cc/8WZV-8XF7>]. These transcriptions were quoted in Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1953 (2003) (“Black, Frankfurter, Stone, were very clear that that was not unconstitutional but that . . . *Endo* would have to turn upon the construction of the regulations.”).

316. Douglas’s notes read: “U.S. concedes . . . clearance implied determination that she was not disloyal . . . once loyalty is shown basis for military decision disappears—this woman is entitled to summary release.” Justice William O. Douglas Conference Notes (Oct. 16, 1944), *Endo*, 323 U.S. 283, Lucile Lomen Collection (SC0776), Box 1, Folder 11, Dept. of Special Collections and University Archives (Stanford University Libraries, Stanford, CA).

317. It does not appear that Douglas’s law clerk briefed Suspension Clause issues to the Justice. See Jennie Berry Chandra, *Lucile Lomen: The First Female United States Supreme Court Law Clerk*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 206, 207 (Todd C. Peppers & Artemus Ward eds., 2012). It would take another ten years before the Court finally adopted the latter argument in *Bolling v. Sharpe*, 347 U.S. 497 (1954) and subjected the federal government to the non-discrimination principles of the Equal Protection Clause.

318. Justice Roberts questioned the Court’s interpretation of the military regulations and made the above constitutional argument. *Endo*, 323 U.S. at 310 (Roberts, J.). Justice Murphy would have held the internment to be a product of “the unconstitutional resort to racism.” *Id.* at 307 (Murphy, J., concurring). Justice Jackson’s files reveal that he made notes on a draft of Douglas’s *Endo* opinion suggesting he, too, would have reached the constitutional issues and found for *Endo*: “Finds no constitutional vice/Seems to sanction mass detention without individual charges of disloyalty.” Robert H. Jackson, Handwritten Note (circulated Nov. 8, 1944), Manuscript Division, Papers of Robert H. Jackson, , Container No. 133 (Library of Congress) (marginal note on first page of Douglas opinion in *Endo*) (cited in Gudridge, *supra* note 315, at 1959). Justice Jackson also penned a concurrence that he never circulated suggesting as much. See Gudridge, *supra* note 315, at 1959, 1969–70. His draft is discussed further below.

It appears that the Court delayed announcing its *Endo* decision to give the government more time to prepare its response, and possibly to stall until after the 1944 presidential election. Supporting this conclusion is an internal Court memorandum sent by Douglas to the Chief Justice in November 1944 asking why, if the entire Court agreed that the government was detaining Endo unlawfully, the decision had yet to be announced.<sup>319</sup> Some weeks later, on December 18, 1944, the Court finally released the decision, but only one day after the President essentially rescinded 9066. On December 17, 1944, Major General Henry C. Pratt issued Public Proclamation No. 21, which declared that as of January 2, 1945, all Japanese American evacuees were free to return to their homes on the West Coast.<sup>320</sup> In the weeks that followed, the government began the process of closing down the camps. At the time—some three years after the attacks on Pearl Harbor—the camps still detained some 85,000 persons.<sup>321</sup>

#### D. The Supreme Court After the War

By 1946, when it tackled the *Duncan* case, the Supreme Court was no longer inclined to give blanket deference to the military. *Duncan* actually involved two underlying cases brought by petitioners Harry E. White and Lloyd C. Duncan. Both were United States citizens who had been denied a host of procedural rights during their trials by provost courts for criminal charges relating to, in White's case, embezzlement, and in Duncan's, the assault of two Marine sentries.<sup>322</sup> They had filed their petitions in 1944, a full year after the initial restoration of civil government and reopening of civilian courts on the Islands.

In each petitioner's case, the district court explored in detail whether existing conditions justified the suspension in Hawaii and ultimately ordered both petitioners released. After the Ninth Circuit reversed, the Supreme Court granted review of petitioners' challenges to the lawfulness of both the suspension and the wartime military rule then governing in the Hawaiian Territory.<sup>323</sup> But before the consolidated cases made their way to the Court, Roosevelt formally

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319. See Memorandum from William O. Douglas to Harlan Stone (Nov. 28, 1944), Manuscript Division, Papers of William O. Douglas, Box 116, Folder No. 70 O.T. 1944, *Endo v. Eisenhower*, Certiorari, Conference & Misc. Memos, (Library of Congress) (arguing that a government request for delay should be ignored and that "Endo . . . is a citizen, insisting on her right to be released—a right which we all agree she has. I feel strongly that we should act promptly and not lend our aid in compounding the wrong through our inaction any longer than necessary to reach a decision") (quoted in Gudridge, *supra* note 315, at 1935 n.11); see also IRONS, *supra* note 201, at 344–45; ROBINSON, *supra* note 218, at 230 (noting the widely reported rumor that Justice Frankfurter had tipped off the War Department as to the forthcoming holding); Gudridge, *supra* note 315, at 1953–64 (detailing the Justices' deliberations in *Endo*).

320. Public Proclamation No. 21 (Dec. 17, 1944), 10 Fed. Reg. 53–54 (Jan. 2, 1945).

321. PERSONAL JUSTICE DENIED, PT. 2, *supra* note 13, at 3.

322. *Duncan v. Kahanamoku*, 327 U.S. 304, 307–311 (1946).

323. *Id.* One of the two questions on which the Court granted certiorari read: "Was the privilege of the writ of habeas corpus suspended as to this case on April 20, 1944?" Petition for Writ of Certiorari at 7, *Duncan*, 327 U.S. 304 (No. 791).

terminated martial law in Hawaii and restored the writ of habeas corpus in an order issued on October 24, 1944.<sup>324</sup> In light of his acts, the Supreme Court chose “not [to] pass upon the validity of the order suspending the privilege of habeas corpus,” although it had granted review over the question.<sup>325</sup>

The Court nonetheless proceeded to reach the merits of the petitioners’ challenge to martial law and the propriety of their military trials. The Court began by rejecting outright the notion that such questions should be immune from judicial review. As Chief Justice Stone observed in a concurring opinion, “executive action is not proof of its own necessity, and the military’s judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency.”<sup>326</sup> It followed that asserted military necessity, standing alone, could not sustain the government’s actions. Notably, this was the same Chief Justice Stone who only three years earlier had written for the Court and deferred extensively to the military in *Hirabayashi*.

Now, charting a very different course, the Court held that any declaration of martial law must be subject to significant judicial scrutiny because such a declaration represents the “antithesis” of our system of “[c]ourts and . . . procedural safeguards.”<sup>327</sup> Applying such scrutiny to the case at bar, the Court found the facts supporting the necessity of martial law wanting:

[M]ilitary trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to . . . permit[] such a radical departure from our steadfast beliefs.<sup>328</sup>

Justice Black’s majority opinion listed several historic precedents to support this proposition. These included President Washington’s instructions to the military during the Whiskey Rebellion, which Black emphasized as highlighting the military’s subordination to civilian authorities and its obligation to deliver insurgents to the civilian courts.<sup>329</sup> Black was, at the same time, careful to except

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324. See Proclamation No. 2627, 3 C.F.R. 41 (1943–1948) (Oct. 24, 1944). Details on the transition to civil law may be found in Anthony, *supra* note 202, at 482–483. At the time, some news accounts pointed to Judge Delbert E. Metzger’s role in the demise of martial law in the Islands. See, e.g., *Two Years Too Late*, CHICAGO TRIBUNE, Oct. 28, 1944, at 10 (“[Roosevelt] would not have yielded to the obvious even now if it had not been for the resolute courage of Judge Delbert E. Metzger . . .”); see also *id.* (“Mr. Roosevelt has ended martial law in Hawaii, two years too late and less than two weeks before the election.”).

325. *Duncan*, 327 U.S. at 312 n.5.

326. *Id.* at 336 (Stone, C.J., concurring).

327. *Id.* at 322 (majority opinion). The procedures of the provost courts were different, to say the least, from that of the typical civilian court. For example, one press account noted that before the Ninth Circuit, Duncan’s lawyers “described a typical provost court judge as a soldier sitting on the bench with a gun on one side, a gas mask on the other, and ‘a big cigar in his mouth.’” *Charge Abuse of Civilians in Army Courts: Tell of Judges in Hawaii with Guns at Side*, CHICAGO DAILY TRIBUNE, July 2, 1944, at 1.

328. *Duncan*, 327 U.S. at 317.

329. *Id.* at 320–21.

from the Court's discussion the "well-established power of the military to exercise jurisdiction over members of the armed forces," as well as "enemy belligerents, prisoners of war, or others charged with violating the laws of war."<sup>330</sup> This was an important caveat when held up against the Court's decision earlier in the war on this subject in *Ex parte Quirin*.<sup>331</sup>

The *Duncan* Court then relied upon the post-Civil War decision *Ex parte Milligan*'s "emphatic[] declar[ation] that 'civil liberty and this kind of martial law . . . [are] irreconcilable'" to declare that the Hawaiian Organic Act had not authorized the displacement of civil law any more than absolutely necessary.<sup>332</sup> (Recall that the territorial governor purported to draw his authority to suspend and declare martial law on the afternoon of the Pearl Harbor bombings from the Hawaiian Organic Act.<sup>333</sup>) In the Court's view, it did not matter that the Hawaiian Organic Act had expressly recognized the declaration of martial law as a wartime possibility. Nor did the Court pause in the face of government assertions of wartime necessity. Indeed, Chief Justice Stone took the position in his concurrence that the record clearly showed that, even as early as February 1942, "the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order."<sup>334</sup> Notably, the Court did not decide the case on constitutional grounds, as it had *Milligan*, but the Constitution loomed large in the backdrop all the same.<sup>335</sup>

Thus, some eight months after the Japanese surrendered to Allied forces, the *Duncan* Court rejected the sweeping imposition of martial law in the Hawaiian Territory, which had governed during most of the war and embraced once again—as it had in the wake of the Civil War in *Milligan*—a narrow view of martial law grounded in necessity. Implicit in the *Duncan* decision was a recognition that any other ruling would have sanctioned the large-scale and years-long displacement of core constitutional protections associated with individual liberty. Further, the strongest argument in favor of permitting Congress such license—its broad powers over United States territories—gave the Court little pause. Specifically, the Justices rejected outright the idea that

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330. *Id.* at 313–14. Black also excepted the situation in which the military establishes tribunals "as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." *Id.* at 314.

331. *See* 317 U.S. 1 (1942).

332. *Duncan*, 327 U.S. at 324 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124, 125 (1866)).

333. *See supra* text accompanying notes 202–206.

334. *Duncan*, 327 U.S. at 337 (Stone, C.J., concurring).

335. Concurring, Justice Murphy believed the Constitution compelled reversal. *See id.* at 325 (Murphy, J., concurring). Chief Justice Stone, also concurring, observed that the Court had a long history of case law defining martial law as "a law of necessity," and argued that the precedents must inform the Court's interpretation of the Hawaiian Organic Act. *Id.* at 620 (Stone, C.J., concurring).

Hawaiian citizens enjoyed lesser claim to the constitutional rights associated with a fair trial.<sup>336</sup>

*E. Anticanons, the Forgotten Suspension Clause, and Declining Deference: Evaluating the Court's Work*

As explored above, both during and immediately following the war, the Supreme Court confronted a host of issues involving how the Constitution functions in wartime. Thus, the Court reviewed a host of military regulations issued under 9066, including those that led to the mass detention of Japanese Americans and the imposition of martial law and suspension of habeas corpus in the Hawaiian Territory. In evaluating the Court's work, one finds a Court eager to stay out of the political thicket during the war, just as the British courts had done. But one also finds a Court that grew more comfortable rebuking excessive exercises of executive power after the war.

Begin with the cases arising under 9066. The military directed its regulations implemented under the auspices of 9066 solely at persons of Japanese ancestry, whether United States citizens or not. Thus, the policies quite obviously involved deeply troubling questions of racial and ethnic discrimination. To the Court, this was of no moment. Specifically, the Court in *Hirabayashi* and *Korematsu* infamously rejected the argument that such targeting violated the constitutional principles of either due process or equal protection, the latter a doctrine not yet fully incorporated as applying to the federal government. (That did not come until 1954 in *Bolling v. Sharpe*.<sup>337</sup>) As any law student today knows, *Korematsu* has come to epitomize what constitutional law scholars call an "anticanon"—namely, a decision that is widely accepted as wrong.<sup>338</sup> And it is. For this reason, last Term, the Supreme Court overruled *Korematsu*, albeit in dictum.<sup>339</sup> It bears highlighting, however, that the Court has never overruled *Hirabayashi*, which contains similarly broad, dangerous, and deeply troubling language.<sup>340</sup>

Beyond the glaring discriminatory nature of all of the regulations issued under 9066, there was an additional constitutional problem with the end result of those regulations, namely the mass detention of Japanese Americans. Specifically, their incarceration plainly and egregiously violated the Suspension

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336. See *id.*, 327 U.S. at 318 (majority opinion) ("[C]ivilians in Hawaii are entitled to the constitutional guarantee of fair trial to the same extent as those who live in any other part of our country.").

337. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

338. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 422–27 (2011).

339. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

340. In this respect, one might analogize *Hirabayashi* to *Beowulf*'s second monster. See Eric L. Muller, *Korematsu, Hirabayashi, and the Second Monster* 97 TEX. L. REV. (forthcoming 2019) (available at SSRN: <https://ssrn.com/abstract=3335926>).

Clause.<sup>341</sup> Notably, many key government actors recognized this point when the military first proposed an internment policy. But in the end, it was only the dissents of Justices Roberts and Jackson in *Korematsu*, along with Justice Jackson's uncirculated concurrence in *Endo* discussed below, that hinted at what Biddle had recognized from the very beginning—namely, that the internment of Japanese American citizens could not take place “unless the writ of habeas corpus [wa]s suspended.”<sup>342</sup>

Whatever the reason for the Court's approach in the Japanese American cases during the war—whether it derived from the targeted nature of the regulations, excessive deference to the military, or something else—the contemporary failure properly to recognize this glaring constitutional problem with the internment is profoundly regrettable. The historical evidence resoundingly shows that the Suspension Clause's core purpose is to prohibit the detention of citizens outside the criminal process in the absence of a valid suspension.<sup>343</sup> The suspension model has been consistent for centuries, whether faced with Jacobite sympathizers suspected of plotting to return the throne to the Stuart line, American colonists fighting for independence, or alleged Confederate sympathizers during the Civil War. Specifically, where those suspected of disloyalty have enjoyed the habeas privilege either under the Habeas Corpus Act or the Suspension Clause, Anglo-American habeas jurisprudence has always required a valid suspension to authorize detention for national security purposes outside the criminal process—even in wartime. Up until World War II, American law had long recognized that the proper means of legalizing detentions of this very nature was through suspension and only through suspension.<sup>344</sup>

Further, contrary to the suggestion of the *Endo* Court, it has never mattered whether a person has passed a so-called “loyalty” test, nor should it. In the absence of a valid suspension, lawful detention—whether in wartime or not—may only be predicated upon timely criminal proceedings. *Endo*, in this regard,

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341. To be sure, some have argued for an understanding of the Suspension Clause that would not have served as a bar to the mass detention of Japanese Americans during World War II. For example, one professor who interprets the Clause solely as a remedial measure contends:

“[T]he need to constitutionalize a guarantee to criminal process in citizen detention scenarios is—at least in terms of raw numbers—quite small . . . [Further,] because it eliminates excess detention capacity, [such a rule] over-constrains military flexibility during periods of non-suspension.” Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 903-904 (2019). Given that the government incarcerated some 120,000 Japanese Americans—70,000 of whom were citizens—for years on end and based upon no reason other than general discriminatory animus, it is more than a little difficult to conclude that this conception of the suspension authority presents a benign danger. See *id.* (maintaining erroneously that “the number of citizens the executive has subjected to indefinite national security detentions is negligible”).

342. Memorandum, Attorney General Francis Biddle to President Franklin Delano Roosevelt (Feb. 20, 1942), Japanese Evacuation and Relocation Study Papers, reel 1 (Bancroft Library, University of California, Berkeley).

343. See generally, TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34.

344. For extensive discussion of this background, see generally *id.*

missed the forest for the trees.<sup>345</sup> And although Justice Jackson wrote a concurrence in *Endo* that criticized the Court's emphasis on loyalty and came very close to embracing the proper interpretation of the Suspension Clause, he never cited the Clause itself. He also apparently never circulated his opinion and he opened the draft by disclaiming that "[i]f [Endo] were in military custody for security reasons, even if I thought them weak ones, I should doubt our right to interfere for reasons I have stated in *Korematsu's* case."<sup>346</sup> This language undercuts the notion that Jackson understood the function of the Suspension Clause in the Constitution. Nonetheless, Jackson's subsequent language bears highlighting for embracing the Clause's core purpose:

"[P]rotective custody" on an involuntary basis has no place in American law. The whole idea that our American citizens' right to be at large may be conditioned or denied by community prejudice or disapproval should be rejected by this Court the first time it is heard within these walls.<sup>347</sup>

Further, in *Endo*, there was no argument to be made that martial law somehow justified the mass internment of Japanese Americans in the western United States. As *Milligan* held, and as *Duncan* later reaffirmed, martial law is only appropriate within the "theatre of active military operations, where war really prevails . . . [and] no power is left but the military."<sup>348</sup> Borrowing further from *Milligan*, the civilian courts in the western United States were fully "open and their process unobstructed."<sup>349</sup> Accordingly, the Court's holding in *Endo*—despite ushering in the demise of the internment camps—misunderstood the entire history of the Suspension Clause and regrettably left unquestioned as a constitutional matter a deeply problematic and dangerous historical precedent.

There were additional problems with the Court's decision to defer to the executive in the Japanese American cases. As detailed above, the President himself had been briefed on these constitutional problems, but nevertheless issued 9066 and gave the military extensive discretion to implement 9066 as it saw fit. In so doing, Roosevelt apparently subscribed to the view that such legal questions were not the proper concern of a wartime president but instead the

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345. As the late Chief Justice Rehnquist wrote of this episode, "[e]ven in wartime, citizens may not be rounded up and required to prove their loyalty." WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 206 (1998). The *Endo* majority opinion emphasized loyalty in reaching its holding, noting: "He who is loyal is by definition not a spy or saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Ex parte Endo*, 323 U.S. 283, 302 (1944).

346. Gudridge, *supra* note 315, at 1969 (quoting J. Jackson's draft concurrence).

347. *Id.* at 1970; *see id.* at 1969 ("There is no way by which trial techniques can establish what is in a man's heart . . ."). Jackson also wrote: "[U]nder our form of government it has never been thought that a citizen must prove or be admitted to be harmless in order to be free. On the contrary, it has been supposed that it must be charged that he has committed or conspired or attempted or threatened to commit some crime before he could be temporarily detained, and the charge must be speedily proved if he is to be held." *Id.*

348. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

349. *Id.* at 121.

proper province of the courts.<sup>350</sup> Setting aside for the present whether there is merit in this argument—which overlooks the fact that the President, just like Article III judges, takes an oath to uphold the Constitution—this only highlights that the Court’s handling the World War II Japanese American cases was not its finest hour. As Professor Eugene Rostow aptly lamented soon after the decisions came down (primarily targeting *Hirabayashi* and *Korematsu*): “This was not the occasion for prudent withdrawal on the part of the Supreme Court, but for affirmative leadership in causes peculiarly within its sphere of primary responsibility.”<sup>351</sup> With the benefit of hindsight, however, the fact that the Court never ruled on the Suspension Clause’s role in these cases may well be a good thing, given that it could have announced an erroneous and dangerous precedent upholding the internment against constitutional challenge.

The contrast between *Duncan*, decided after the war, and *Hirabayashi* and *Korematsu*, decided during the war, is hard to overstate.<sup>352</sup> Unlike in its wartime decisions, the Court in *Duncan* said nothing of deference to a wartime executive and the military and did not hesitate to second-guess policies implemented in the wake of Pearl Harbor. Instead, the opinion stands as a stark rebuke of government wartime policies in the Hawaiian Islands and a strong endorsement of *Ex parte Milligan*’s continuing validity.

It is likely no accident that the Court decided both *Milligan* and *Duncan* in the postwar setting, when the stakes of rendering an opinion reproaching the executive branch are seemingly much lower. On this score, two dissenting Justices in *Duncan* argued that it was “all too easy in this postwar period to assume that the success which our forces attained was inevitable and that military control should have been relaxed on a schedule based upon such actual developments.”<sup>353</sup>

Regardless of whether the dissenters had a valid point, there may be more to the story behind *Duncan*. *Duncan*’s author, Justice Black, had also authored the exceedingly deferential decision in *Korematsu*. Perhaps by 1946, Black had realized that the government had misled the *Korematsu* Court as to key

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350. See *infra* at text accompanying notes 388–390.

351. See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 504, 511 (1945). Another early scholarly evaluation was equally harsh. See GRODZINS, *supra* note 2, at 358 (criticizing the Court for ignoring the “extreme gravity of the civil liberties deprivation; its racial character; the fact that people were condemned en masse rather than according to the principle of individual liability; and the belief held by many that evacuation was the result of public pressures and racial animosity rather than the result of carefully conceived military policy”).

352. The same may be said of the contrast between *Duncan* and the Court’s wartime decision in *Ex parte Quirin*. See 317 U.S. 1 (1942). *Quirin*—which upheld the military commission convictions of eight Nazi saboteurs, one of whom claimed United States citizenship—was decided on an expedited basis early in the war. It was more recently relied upon by the Court as support for the proposition that United States citizens may be held as enemy combatants in the ongoing war on terrorism. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). For discussion and criticism of *Quirin* and *Hamdi*, see TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34, at 246–62.

353. *Duncan v. Kahanamoku*, 327 U.S. 304, 351 (1946) (Burton, J., dissenting, joined by Frankfurter, J.).



underlying facts. Indeed, in both *Hirabayashi* and *Korematsu*, the Court's deference to the government followed expressly from arguments predicated upon military necessity. But as explored above, the well-documented positions of many key government officials, along with a number of intelligence reports from the period immediately preceding the issuance of 9066, undermine any argument of military necessity. (For that matter, a factual record on the question had never been developed in the lower courts in either case, as would normally be required.<sup>354</sup>) This important background led two prominent Justice Department lawyers charged with briefing both cases to concede in the briefing that there existed little evidence to support DeWitt's claims about the threat posed by Japanese Americans in the West. In both cases, superiors removed the concessions.<sup>355</sup> (In *Korematsu*, the government's brief was already at the printer when superiors ordered the changes.)<sup>356</sup>

In the end, the Court's approach to reviewing the wartime actions of the political branches in *Duncan* and *Milligan* stand entirely at odds with its approach in *Hirabayashi* and *Korematsu* with respect to the question of deference to government claims of military necessity. The next Part tackles the propriety of judicial deference in wartime within the larger context of revisiting and evaluating the treatment of citizen detention matters by the political actors in Great Britain and United States during the war.

#### IV.

##### “[T]HE CONSTITUTION HAS NEVER GREATLY BOTHERED ANY WARTIME PRESIDENT”

Given that Great Britain and the United States share a common legal tradition in which the privilege of the writ of habeas corpus looms large, there is much to be learned by comparing the approach of each country to the detention of citizens outside the criminal process during World War II. Ultimately, both countries did so. But unlike the British policies, the American policies targeted a specific racial and ethnic group. Further, the scale of the American program massively eclipsed that of the British program. It

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354. The dissents of both Murphy and Jackson drew attention to the potential importance of this development. Jackson, for example, asked “How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court.” *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); see also *id.* at 241 (Murphy, J., dissenting) (“[T]here [is] no adequate proof that the [FBI] and the military and naval intelligence services did not have the espionage and sabotage situation well in hand . . .”).

355. See IRONS, *supra* note 201, at 204, 278–92 (detailing events).

356. As Peter Irons documents, Edward J. Ennis and John L. Burling believed that the Justice Department had a “duty” to inform the Supreme Court of the Ringle Report. Ennis had been involved as a Justice Department official in discussions leading up to 9066 and also litigated the *Duncan* case. See *id.* Professor Irons places ultimate responsibility for the final brief submission on Solicitor General Charles Fahy. See *id.*; see also Peter Irons, *How Solicitor General Charles Fahy Misled the Supreme Court in the Japanese American Internment Cases: A Reply to Charles Sheehan*, 55 AM. J. LEGAL HIST. 208 (2015).

was also the case that one of the major influences behind shutting down the British program was Churchill, while in the United States, Roosevelt resisted closing the internment camps at just about every turn. In the meantime, the courts in both countries deferred extensively—if not entirely—to the political branches during the war with respect to the wartime detention policies. In Britain, the Law Lords all but refused to review individual challenges, while in the United States, the Supreme Court rubber-stamped invidious discrimination in *Hirabayashi* and *Korematsu* and dodged the important constitutional questions presented in *Endo*. Even when it did hand a wartime victory to a litigant, as it did in *Endo*, it was narrow and only came after the Court gave the White House time to preempt its effect and announce the closing of the camps.

Comparing the British and American experiences during the war prompts several significant questions. First, what might this comparison teach us about the ability of the executive branch (or, for that matter, the political branches more generally) to self-police with respect to constitutional principles and legal traditions in wartime? Second, what lessons might this comparison offer with respect to the proper role of the courts in reviewing the actions of the political branches during such periods? And finally, how might the distinctive aspects of the British and American legal and political traditions inform these separation of powers inquiries?

In wartime Britain, policing the preventive detention of citizens turned on “self-regulation within the executive . . . with only a very limited degree of public accountability dependent upon the leakage of at least some information about what [was] going on,”<sup>357</sup> along with parliamentary oversight.<sup>358</sup> Perhaps this is not surprising given British tradition. Indeed, some of the classic resources on the British Constitution devote exceedingly little space to the judiciary and focus instead predominantly upon Parliament and the executive.<sup>359</sup> For example, Sir Ivor Jennings once wrote that “[t]he law is what Parliament provides, and it is in Parliament that the focus of our liberties must be found.”<sup>360</sup>

The preceding observation might strike an American reader well versed in Alexander Hamilton’s famous *Federalist No. 78* essay as rather jarring. Hamilton envisioned that the American federal judiciary should “be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>361</sup> In other words, Hamilton envisioned the courts as playing a crucial role in checking the political branches, and as he explained in *No. 78*, the judicial independence secured by tenure and salary protection was crucial to that very task. Churchill,

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357. SIMPSON, *supra* note 17, at 421.

358. See Cotter, *supra* note 124, at 274–85.

359. See, e.g., WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (1867); JENNINGS, *supra* note 29.

360. JENNINGS, *supra* note 29, at 208.

361. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 87, at 466.

by contrast, governed within a constitutional tradition that viewed Parliament as the primary mechanism for the protection of individual liberty.

To be sure, even against this backdrop, there are those who have argued that the courts should have played a stronger role in Britain during the war. For example, Simpson has contended that “it is not clear that the courts had to wash their hands of responsibility as enthusiastically as they did. They could have carved out for themselves a larger role.”<sup>362</sup> Perhaps the courts could have demanded greater transparency from the executive in detention cases or enforced some constraints by applying an objective test to the “reasonable belief” requirement set forth in Regulation 18B.<sup>363</sup> After all, Parliament had *not* formally suspended the privilege during the war and, importantly, Parliament had amended the version of Regulation 18B that was before the Law Lords in *Liversidge* for the very purpose of curtailing the unlimited discretion that the original version of Regulation 18B had granted the Home Secretary. (As also noted earlier, the attorney general assumed that certain portions of the limiting language in Regulation 18B might be judicially enforced.<sup>364</sup>) Put another way, there is a strong argument that Parliament had indeed purported to constrain the Home Secretary’s discretion by requiring him to provide an objectively reasonable basis for believing that national security warranted depriving a citizen of his or her liberty.

What is most noteworthy about the British experience during World War II is that one of the leading voices to champion the British Constitution and legal traditions turned out to be the Prime Minister himself. Indeed, it was Churchill who urged the demise of the 18B regime.<sup>365</sup> This is remarkable for two reasons. First, the British traditions heralded by Churchill derived not from a written and binding constitution, but from custom and tradition, from which Parliament had deviated on prior occasion.<sup>366</sup> For a wartime executive nonetheless to champion such legal traditions against the tide of popular opinion and in the face of challenging wartime conditions is truly extraordinary. Second, the British experience lends support to the idea that the executive can and sometimes will take the lead in declaring and protecting a country’s constitutional values—even in wartime, and even absent prodding by the courts. On this score, it bears

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362. SIMPSON, *supra* note 17, at 421.

363. Interestingly, British courts’ reluctance to scrutinize the government’s bases for detention foreshadows how some judges have approached the task of reviewing habeas challenges to enemy combatant status determinations brought by Guantanamo Bay detainees. *See, e.g., Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring) (positing that “[w]hen we are dealing with detainees, candor obliges me to admit that one can not help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism”).

364. *See supra* note 162 (discussing the Attorney General’s Note appended to Memorandum of the Home Secretary, “Should Detention Orders be Made Under Defence Regulation 18B Against Certain Persons Carrying on Prejudicial Propaganda,” *supra* note 136).

365. *See supra* Part II.C. (discussing Churchill’s change of course on Regulation 18B).

366. *See supra* text accompanying notes 111–112 (discussing the World War I regime).

highlighting that the British established the Advisory Committee panels within the executive branch to review internee cases, and although the Committee was often overruled by the Home Secretary, its recommendations did result in some releases.<sup>367</sup> Of course, the United States government created nothing remotely comparable to review the cases of Japanese Americans incarcerated in the camps—instead detaining those who fell within the web of the military regulations indiscriminately.

But important differences between the British and American legal frameworks and political contexts, as well as the implementation of their respective wartime detention policies, call into question just how much the British experience can inform debates over the separation of powers in the American constitutional system. First, as noted above, Churchill operated within a legal tradition that did not uniquely elevate the courts as the government actor charged with protecting individual liberties. To the contrary, as the leader of Parliament, Churchill likely conceived of his role and responsibilities as obligating him to marry his actions with the constitutional values that he understood to be foundational in British history and tradition. Roosevelt held a decidedly different view. He believed that any such responsibility belonged to the courts and was not a concern worthy of a wartime president's time.<sup>368</sup>

Second, Churchill never faced a general election during the war, unlike Roosevelt, who stood for reelection in 1944. In Great Britain, the three major political parties agreed to an “electoral truce” in 1939 pursuant to which they would not compete with each other for parliamentary seats for the “duration of the war.”<sup>369</sup> This fact gave Churchill some insulation from popular opinion as he charted the country's course in the war. This insulation, in turn, may well have factored into his willingness to push for an end to the Regulation 18B regime in 1943, even though it still enjoyed considerable popular support.<sup>370</sup> (The threat of a German invasion had passed by this point, a fact that likely also played a role in Churchill's decision to turn completely against the Regulation 18B program.<sup>371</sup>) The fact that Roosevelt rebuffed the advice of those who counseled

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367. See *supra* note 152 (noting that the Home Secretary sometimes agreed with the Advisory Committee's recommendations).

368. See *infra* text accompanying note 391.

369. BROOKE, *supra* note 30, at 37–38 (“The demands of national unity and the practical difficulties involved in waging by-election campaigns amidst the displacement of war were strong arguments in favour of an electoral truce . . .”). To be sure, the “electoral truce” was always subject to “be terminated at any time,” so political considerations may not have been completely absent from Churchill's mind. *Id.* at 37. Great Britain held its next general election in July 1945, two months after VE Day. Churchill's party lost a number of seats and he lost the Prime Ministership. See *id.* at 326–27.

370. Indeed, when the Home Secretary acted in the wake of Churchill having urged him to release Oswald Mosley and wind down the Regulation 18B detention program, his actions were met with “angry demonstrations in Trafalgar Square.” ROBERTS, *supra* note 133, at 803.

371. *Id.* (noting that Churchill's change of position coincided with the fact that “now the threat of invasion had lifted”); see also WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 933 (1960) (observing that Germany's loss at Stalingrad in 1943 “marked the great turning point in World War II” after which the Germans primarily were locked in “a defensive

him to close the Japanese American detention camps until after the 1944 election, only relenting after he won reelection and learned that the Court would rule against the government in *Endo*, further suggests that political context matters a great deal for an executive managing a war. It also suggests that a fixed schedule for elections like the American system may undermine any inclination on the part of the executive to protect civil liberties in wartime.

A third major difference between the British and American detention policies during the war also reveals important lessons. Regulation 18B in policy and practice did not target any particular minority or racial group, but instead impacted individuals who came from some of the same walks of life as those who designed and carried out the detention policies. But in the United States, the military regulations that followed under 9066 specifically and exclusively targeted Japanese Americans, a minority population viewed by many as unassimilable foreigners, regardless of their citizenship status.<sup>372</sup> Even the Supreme Court in its *Hirabayashi* decision expressly called into question the ability of Japanese Americans to assimilate into American society. Further, this same mindset appears throughout public statements and government documents surrounding the internment.<sup>373</sup> (Notably, these discriminatory wartime policies came on top of naturalization policies that excluded many Asian immigrants from becoming citizens.<sup>374</sup>) As history has demonstrated, the majoritarian political branches in the United States are poorly suited to protect the interests of discrete and insular minorities. By contrast—given that the British government detained Churchill’s relatives and a member of Parliament under Regulation 18B,<sup>375</sup> there is every reason to believe that the plight of those swept up in Regulation 18B resonated on some score with those who were charged with adopting and implementing the policy.

All of this contextualizes the vast differences between the wartime detention of citizens in Britain versus the United States. These differences should give pause to any argument that relies upon the British experience as generally supporting the idea that the executive can self-regulate with respect to constitutional values and civil liberties in times of war, particularly where minority interests are at stake. Indeed, the American experience during the war

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struggle”). Of course, there never was any serious threat of invasion to the United States mainland, which only underscores all the more the problematic nature of the massive detention of Japanese Americans that took place under the auspices of 9066 and the Supreme Court decisions upholding many of the policies that led inevitably to the mass incarceration.

372. See, e.g., LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS (1996).

373. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 96–99 (1943) (discussing the high number of dual Japanese and American citizens and remarking that “[t]here is support for the view that [circumstances] have in large measure prevented the[] assimilation” of Japanese Americans); Memorandum, “Alien Enemies on the West Coast (and Other Subversive Persons),” *supra* note 219, at 2 (observing that “a substantial number of the Nisei [citizens of Japanese ancestry born to immigrant parents] bear allegiance to Japan [and] are well controlled and disciplined by the enemy”).

374. See *supra* note 5.

375. See text accompanying notes 133–135.

suggests just the opposite and calls into question the ability of both the executive and the courts to ensure that the government “turn[s] square corners” in its dealings with the people.<sup>376</sup> Studying the lead-up to 9066 and the implementation of the internment policy during the war, moreover, turns up extensive evidence underscoring the conclusions drawn by a commission later appointed by Congress to study the internment. That commission found that the internment was the product of “race prejudice, war hysteria, and a failure of political leadership.”<sup>377</sup> This has much to teach us today about the assumptions that should inform our thinking about the separation of powers in the American constitutional framework.

Begin, for instance, with the attorney general and the executive branch. Biddle has been criticized for failing to remain steadfast in his objections as to the wisdom and legality of internment.<sup>378</sup> His legacy is certainly not helped by his January 30, 1942, memorandum to the President, which raised the possibility of suspension on the mainland.<sup>379</sup> Nor is it helped by the memorandum that he wrote on February 20, 1942 (the day after the issuance of 9066), in which he advised the President that 9066 “gives very broad powers to the Secretary of War and the Military Commanders,” who could “exercise[]” their authority “with respect to Japanese, irrespective of their citizenship.”<sup>380</sup> One of Biddle’s lawyers at the Justice Department, Edward Ennis, explained in a 1942 interview that for his boss “[t]he stakes were too high and the emergency too great. Therefore, the Attorney-General let the Army have its way.”<sup>381</sup>

This mindset seems to have controlled in the War Department as well, where Stimson and his deputy McCloy ultimately came to view constitutional concerns as irrelevant in the face of overblown risk assessments and, more generally, their charge to prosecute a successful war.<sup>382</sup> Other legal actors appear to have adopted similar views, including Solicitor General Charles Fahy, who litigated the *Hirabayashi* and *Korematsu* cases in the Supreme Court while presenting false claims about military necessity.<sup>383</sup>

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376. This phrasing inverts the classic wording used by Justice Oliver Wendell Holmes. See *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.) (“Men must turn square corners when they deal with the Government.”).

377. PERSONAL JUSTICE DENIED, PT. 2, *supra* note 13, at 5 (emphasis added). The commission also concluded that “no documented acts of espionage, sabotage or fifth column activity were shown to have been committed by any identifiable American citizen of Japanese ancestry or resident Japanese alien on the West Coast” in the period leading up to the orders. *Id.* at 3.

378. See, e.g., GRODZINS, *supra* note 2, at 256.

379. See Memorandum, Attorney General Francis Biddle to President Franklin Delano Roosevelt (Jan. 30, 1942), *supra* note 236.

380. Memorandum, Attorney General Francis Biddle to President Franklin Delano Roosevelt (Feb. 20, 1942), *supra* note 342. Biddle’s memorandum never references internment but instead evacuation orders and restrictions on the movement “of certain racial classes, whether American citizens or aliens, in specified defense areas,” which he opined clearly fell under the President’s “general war powers” free of any need for legislation. *Id.*

381. GRODZINS, *supra* note 2, at 271 (quoting interview with Edward Ennis, Sept. 17, 1942).

382. See *supra* text accompanying note 256.

383. See *supra* note 356.

Then, there is Roosevelt. Why, in the face of opposition advanced by key advisers, did he issue 9066 and grant the sweeping authority to the War Department that DeWitt had requested? Indeed, the attorney general and the war secretary initially opposed the resulting policies—particularly that of internment—while Hoover and others expressed deep skepticism over the existence of any sound basis for such policies.<sup>384</sup> Biddle and others had also counseled the president that any detention of citizens without a suspension would be unconstitutional. These facts naturally imply that Roosevelt himself was a driving force behind what followed. Historian Greg Robinson's work supports this conclusion, detailing Roosevelt's extensive involvement in decision to give the military broad authority over Japanese Americans as well as to delay rescinding 9066 and closing the camps until after the November 1944 election.<sup>385</sup> Roosevelt's reluctance followed notwithstanding the pendency of *Endo* before the Supreme Court and against the counsel of several advisers who were prodding him to move more quickly.<sup>386</sup> Robinson contends that Roosevelt's personal predisposition was hostile and racist toward Japanese Americans, and that this was a major factor in Roosevelt's decision to issue 9066 and leave the resulting military orders in operation for much of the war.<sup>387</sup>

More generally, Roosevelt's decisions seem to have followed from his strong inclination to defer to the military in wartime. For Roosevelt, the military had "primary direct responsibility for the achievement of war victory," which "was prerequisite to all else."<sup>388</sup> A conversation between Roosevelt and War Department officials in the days leading up to issuance of 9066 supports this conclusion. In it, the President told the War Department to prepare a plan for wholesale evacuation, and he specifically noted his approval for such policies to encompass the removal of citizens.<sup>389</sup> Following the meeting, Assistant Secretary of War McCloy reportedly said: "We have *carte blanche* to do what we want to as far as the President is concerned."<sup>390</sup>

Biddle recalls the President's decision this way:

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384. First Lady Eleanor Roosevelt also voiced opposition and/or took steps to support those interned as the internment policy continued. See ROBINSON, *supra* note 218, at 122, 171–72, 189, 215.

385. *Id.* at 234.

386. *Id.* at 214, 216–21 (noting that War Secretary Stimson and Interior Secretary Ickes raised points that favored lifting exclusion orders with the President in May 1944, while noting that Biddle counseled against it until after the election); *id.* at 222–23 (detailing the influence of political advisers), 235; PERSONAL JUSTICE DENIED, PT. 1, *supra* note 276, at 215.

387. ROBINSON, *supra* note 218, at 118–21 (surveying a range of evidence from Roosevelt's lifetime).

388. KENNETH S. DAVIS, *FDR: THE WAR PRESIDENT, 1940–1943*, at 424 (2000).

389. For details, see BIDDLE, *supra* note 222, at 218.

390. *Id.* (quoting McCloy); see also ROBINSON, *supra* note 218, at 106 (quoting Stimson's diary about the meeting in which Stimson described Roosevelt as "very vigorous"); *id.* at 109 (noting that Roosevelt defended 9066 in Cabinet meetings on the basis that he should defer to military claims of necessity). Consistent with the notion that Roosevelt placed a high value on deferring to the military, he deferred to the War Department when it decided against a broad evacuation policy in Hawaii despite his strong support for the idea. See *id.* at 158.

I do not think [President Roosevelt] was much concerned with the gravity or implications [of signing 9066]. He was never theoretical about things. What must be done to defend the country must be done. The decision was for his Secretary of War, not for the Attorney General, not even for J. Edgar Hoover . . . . Public opinion was on their side, so that there was no question of any substantial opposition . . . . Nor do I think that the constitutional difficulty plagued him—the Constitution has never greatly bothered any wartime President. *That was a question of law, which ultimately the Supreme Court must decide.*<sup>391</sup>

Accordingly, Roosevelt bears much of the responsibility for setting in motion and keeping in place all that followed under the auspices of 9066. His position appears also to have been heavily influenced by public opinion and political pressure, as is revealed by his resistance to rescinding 9066 and closing the camps until after the 1944 presidential election.<sup>392</sup> Further, and in stark contrast to his British counterpart, Roosevelt viewed it as the job of the courts, and not the president, to weigh the important constitutional questions that 9066 and the resulting military regulations implicated.

During the war, moreover, Congress played virtually no role in evaluating the propriety of the mass detention of Japanese Americans before or after the issuance of 9066. In fact, Congress engaged only one time with the issues, at the behest of the Secretary of War, when it passed legislation criminalizing disobedience of military orders issued under 9066.<sup>393</sup> Otherwise, Congress never debated—much less formalized any decision—with respect to the internment policy. Congress's virtually non-existent engagement during the war on this score stands on very different footing from Parliament's. In stark contrast to Congress, Parliament repeatedly prodded the Home Office for information and engaged in several high-profile cases, such as the Mosley case, to exercise at least some oversight of the program.<sup>394</sup>

In the end, the British and American chief executives struck decidedly different positions on the wisdom and lawfulness of the wartime detention of citizens. In the United States, Roosevelt gave the military a virtual blank check despite the complete lack of evidence suggesting any genuine security threat. He also acted against the legal advice from key advisers who correctly recognized that any policy sanctioning the detention of Japanese American citizens outside the context of a valid suspension would be unconstitutional. But in Churchill,

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391. BIDDLE, *supra* note 222, at 219 (emphasis added). All of this being said, Biddle reportedly believed that opposition from Stimson would have swayed the President to chart a different course. See ROBINSON, *supra* note 218, at 116 (quoting Biddle).

392. See PERSONAL JUSTICE DENIED, PT. 1, *supra* note 276, at 215 (highlighting the importance of the election); ROBINSON, *supra* note 218, at 234 (noting that Roosevelt only came around after months of prodding by advisers three days after the election).

393. See Pub. L. 503, Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (repealed 1976). For greater discussion, see *supra* Part III.B.

394. For details on some of Parliament's oversight of the Home Office, see SIMPSON, *supra* note 17, at 267–70.



one sees an approach that bears a far stronger relationship with earlier wartime episodes in both Great Britain and the United States during which key political figures made a point of working *within* the governing legal framework in addressing the matter of potential domestic enemies. Consider, for example, the actions of Lord North and his administration during the American Revolutionary War. During that war, when faced with rising numbers of American prisoners coming to English shores, North's cabinet sought advice from Lord Mansfield as to the legal status of the American Rebels.<sup>395</sup> Once Mansfield counseled that Americans could claim the benefit of the Habeas Corpus Act as subjects, Lord North introduced suspension legislation in Parliament for the express purpose of legalizing the detention of American prisoners outside the criminal process.<sup>396</sup> Consider as well the actions of President Jefferson, who sought a suspension during the Burr Conspiracy.<sup>397</sup> Once the House of Representatives rejected suspension legislation, Administration officials quickly turned over those prisoners then in military custody to civilian authorities, who now prosecuted the alleged conspirators criminally.<sup>398</sup> Even President Lincoln—the so-called “great suspender”<sup>399</sup>—never once suggested during the Civil War that persons suspected of disloyalty could be detained preventively in the absence of a suspension.<sup>400</sup> One is left to wonder why such legal considerations held so little sway in American political circles during World War II, unlike in earlier periods. Consider, in this regard, the prominence of the Suspension Clause in so much of the Civil War's legal and political discourse.

Ultimately, the distinctions between the American and British contexts and experiences during World War II likely explain the different positions of the chief executives. As noted above, Churchill functioned within a very different constitutional tradition, specifically one that looks to Parliament to guard constitutional liberties. Roosevelt, by contrast, fully subscribed to the view that any questions surrounding the constitutionality of the wartime policies under 9066 were the proper province of the courts. In this regard, Roosevelt's approach was in keeping with the view of many influential members of the Founding generation, who envisioned the courts playing an important checking role on the political branches while upholding constitutional values. Consider James Madison, who posited in that fateful year of 1789 that the “independent tribunals of justice will consider themselves . . . the guardians of [constitutional] Rights,”

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395. For extensive details, see Tyler, *Habeas Corpus and the American Revolution*, *supra* note 50, at 660–91.

396. *See id.*

397. For details, see Tyler, *The Forgotten Core Meaning of the Suspension Clause*, *supra* note 53, at 979–86.

398. *See id.*

399. I borrow the phrase “the Great Suspender” from Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575 (2010).

400. *See* Tyler, *The Forgotten Core Meaning of the Suspension Clause*, *supra* note 53, at 986–89. Lincoln just happened to be wrong as to *which* branch could suspend—to be sure, no small matter. For discussion, consult TYLER, *HABEAS CORPUS IN WARTIME*, *supra* note 34, at 160–67.

and that “they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive.”<sup>401</sup> Indeed, this perspective also found favor in the famous Supreme Court decision in *Marbury v. Madison*, in which Chief Justice John Marshall declared that it is the role of the judiciary “to say what the law is.”<sup>402</sup>

Nonetheless, the contrast is stark between Roosevelt and Jefferson, Lincoln, and earlier executives who internalized at least some regard for constitutional considerations in fashioning wartime detention policies. (This assumes that one can even call the Burr Conspiracy a “war,” a rather dubious proposition to be sure.) Given, moreover, that more recent presidents appear to have followed Roosevelt’s approach rather than that of earlier presidents, this history should give pause to anyone today who might advocate for a robust theory of popular constitutionalism that would diminish the role of the judiciary in fulfilling Madison’s vision.<sup>403</sup> In this respect, consider the more recent actions of the Bush Administration in formulating detention policies with respect to so-called enemy combatants—both citizens and aliens—in the wake of the attacks of September 11, 2001. With its policies targeting citizens for detention as enemy combatants, the Bush Administration went against much of the history of the Suspension Clause. Further, in its treatment of non-citizen detainees, the Bush Administration took the most aggressive approach possible, at times disclaiming any role for domestic or international law to govern its actions.<sup>404</sup>

As also noted, the two chief executives faced different political pressures, with Roosevelt confronting a timely election during the war and Churchill being freed from standing in a general election until after the war. The different political contexts likely mattered greatly with respect to the freedom of each executive to stake out positions at odds with popular views.

Finally, the British and American experiences were also distinct because of *who* they impacted. The simple fact is that the American internment policies that followed under 9066 exclusively targeted a discrete and insular minority with little foothold in the political process. Recall the suggestions of DeWitt and others in the lead up to 9066—later embraced by the Supreme Court in *Hirabayashi*—that Japanese Americans were unassimilable foreigners.<sup>405</sup> Combining these troubling views of key government officials with the fact that any minority group targeted by such policies is unlikely to wield much political

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401. Statement of James Madison, 1 ANNALS OF CONGRESS 439 (1789); 5 WRITINGS OF JAMES MADISON 385 (G. Hunt ed., Philadelphia 1904).

402. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

403. Cf., e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

404. See generally JACK GOLDSMITH, THE TERROR PRESIDENCY (2007).

405. See *supra* Parts III.B., III.C.

power, it is not surprising that the interests of Japanese American did not receive any airing in the political process.<sup>406</sup>

Given the many institutional failings detailed here that occurred during the war, the role of the judiciary in such circumstances to enforce constitutional constraints upon the majoritarian political branches is surely at its zenith, a point that has been and should be accepted as not the least bit controversial.<sup>407</sup> Here, too, contrasting the World War II British approach has much to teach us. To be sure, the lack of robust judicial review in Britain during the war is the subject to this day of criticism. But ultimately, Churchill changed course on Regulation 18B and spearheaded the demise of the policies that it put in place. There is every reason to think that part of what drove such a shift was the fact that the plight of those impacted by the policies resonated with Churchill and others in government. This was not the case with Roosevelt and the animus openly displayed by many political actors and American courts toward the Japanese Americans who suffered losses of liberty and property for which they could never be made whole.<sup>408</sup>

Even assuming that Roosevelt correctly believed believe that the judiciary was responsible for honoring and enforcing constitutional constraints on his authority to prosecute the war, the Supreme Court failed miserably in carrying out its charge during the war. (To be clear, Roosevelt's position should not go unchallenged. After all, such a position openly abdicates any responsibility on the part of the executive to self-regulate on this score, which is impossible to square with the very same oath that the President takes to uphold and defend the Constitution.)

When its actions came under challenge, the executive branch asserted that there was a sound factual and policy basis for the internment policy when, of course, this was not the case.<sup>409</sup> The Supreme Court took these assertions at face value, deferring extensively to military claims of national security necessity in both *Hirabayashi* and *Korematsu*.<sup>410</sup> Further, the Court seemed all too eager to defer on questions of constitutional law as well, issuing decisions that sanctioned racial and ethnic discrimination in *Hirabayashi* and *Korematsu*, while also failing to enforce in *Endo* the constitutional constraints on executive detention

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406. On this point, it is curious that suspension only sporadically entered public discussions during World War II, given that the political climate very likely would have supported its passage.

407. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing how “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

408. Here, it bears repeating that the regulations issued under 9066 exclusively targeted persons of Japanese ancestry and that the government implemented no such policies with respect to German Americans and Italian Americans. By contrast, the British government invoked Regulation 18B to detain Anglo-Italians and Anglo-Germans. See SIMPSON, *supra* note 17, at 223.

409. See *supra* Part III.B.

410. See *supra* Part III.C.

that had long been understood to be at the heart of the Suspension Clause.<sup>411</sup> To make matters worse, the Court delayed issuing *Endo* for political reasons.<sup>412</sup> The results—two decisions that are now viewed as “anticanons” and one that cannot be reconciled with the entire history of the Suspension Clause—reveal the serious dangers inherent in judicial deference to the executive regarding national security in wartime.<sup>413</sup>

There is much to criticize in the actions of both British and American judiciaries during the war. To borrow again from Professor Rostow, “[i]t is hard to imagine what courts are for if not to protect people against unconstitutional arrest.”<sup>414</sup> Indeed, as Lord Atkin wrote in *Liversidge*, it bears remembering that at the heart of our shared Anglo-American legal tradition is the recognition that “one of the pillars of freedom [and] one of the principles of liberty [is] that the judges . . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”<sup>415</sup>

Although the Court seemed to have reclaimed much of its role in its decision in *Duncan* after the war, in many respects, one could argue that *Duncan* was a day late and a dollar short. After all, whatever their continuing legitimacy as legal precedent, *Hirabayashi* and *Korematsu* had the very real result of sanctioning the government’s unconstitutional detention of tens of thousands of United States citizens behind barbed wire in remote barren camps for years. This was neither our country’s, nor the judiciary’s, finest hour.

#### CONCLUSION

In the decades since their internment during World War II, many Japanese American survivors have embraced a famous quotation by Chief Justice Charles Evans Hughes. Although Hughes essentially echoed Assistant Secretary of War McCloy’s assessment of the Constitution as “just a scrap of paper,” he drew an entirely different lesson from that premise. Specifically, he highlighted the importance of the people who stand behind the document and make its words real:

You may think that the Constitution is your security—it is nothing but a bit of paper . . . . You may think that elaborate mechanism of government is your security—it is nothing at all, unless you have sound and uncorrupted public opinion to give life to your Constitution . . . .<sup>416</sup>

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411. *See id.*

412. *See id.*

413. As noted, the Supreme Court has now “overruled” *Korematsu* in dictum, *see* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), but this does little to blot out the stain that the case made on our constitutional fabric.

414. *See* Rostow, *supra* note 351, at 511.

415. *Liversidge v. Anderson* [1942] AC at 244 (HL) (appeal taken from Eng.).

416. 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 175–76 (1951). Hughes made the statement while running for Governor of New York in 1906.

As a study of the British and American approaches to the internment of citizens during World War II reveals, Hughes's remarks, offered in 1906, were prescient. Honoring constitutional principles does indeed demand "sound and uncorrupted public opinion." Further, it requires thoughtful government officials willing to "give life to [the] Constitution" even when public opinion stands at odds with those principles. This position is best embodied by Churchill's message to his Home Secretary urging the repeal of Regulation 18B. As he phrased things: "People who are not prepared to do unpopular things and to defy clamour are not fit to be Ministers in times of stress."<sup>417</sup>

In the United States, both the political branches and the Supreme Court failed to internalize Hughes's aspirations. As a matter of substantive constitutional law, the internment of tens of thousands of Japanese American citizens egregiously violated the Suspension Clause. The Founding generation adopted the Clause to constitutionalize the protections of the English Habeas Corpus Act, and specifically its promise that one who could claim the protection of domestic law could not be detained outside the criminal process in the absence of a valid suspension.<sup>418</sup> Thus, the *Endo* Court's focus on loyalty was entirely beside the point.<sup>419</sup> In the absence of suspension—an extreme state of affairs that the Constitution strictly limits to the situations of "Rebellion" or "Invasion"—the constitutional habeas privilege ensures that persons who can claim the protection of domestic law may not be deprived of their freedom outside the formal criminal process.<sup>420</sup> Loyalty tests—even assuming there could be such a thing—have never been a part of the suspension framework.

In Great Britain, as the war unfolded, constitutional principles fared somewhat better than they did in the United States. But although the British experience regarding the detention of citizens supports the idea that even in wartime the executive can self-regulate, there are important differences between the legal tradition and political context in which the British policies were adopted and the manner in which they were implemented. And of course, even in Great Britain, one must recall that Churchill's opposition and the winding down of the 18B program took years to unfold.<sup>421</sup>

This Article's study of the very different approaches by Churchill and Roosevelt during World War II to preventive detention of citizens suggests that there may be important translation problems with the British experience for American theories regarding the separation of powers in wartime. Specifically, the American experience detailed herein reveals that internal checks within the political branches in the American constitutional tradition are likely to fail in times of war, especially when concerns over national security will most likely

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417. Cable from Prime Minister Winston Churchill to Home Secretary Herbert Morrison (Nov. 29, 1943), in 5 CHURCHILL, *supra* note 1, at 681.

418. See generally TYLER, HABEAS CORPUS IN WARTIME, *supra* note 34.

419. See *Ex parte Endo*, 323 U.S. 283, 295, 302 (1944).

420. See U.S. CONST. art. I, § 9, cl. 2.

421. See *supra* Part II.C.

overrun constitutional considerations and the executive internalizes electoral pressures. The failure of executive self-regulation is also likely where, as was the case with the Roosevelt Administration, there is a predisposition to leave elaboration and enforcement of constitutional considerations to the courts. Finally, the American experience also reveals that the failure to adhere to constitutional traditions and values on the part of the political branches is likely to manifest itself when the government implements policies targeting minority groups with little political power. Thus, in the lead-up to the issuance of 9066, it was of no moment that key officials in the Roosevelt Administration recognized glaring constitutional problems with many of the policies that would follow under the President's order, including the decision to detain Japanese Americans in "Relocation Centers" throughout the war. Nor did it matter that high-level executive branch officials recognized that the factual predicate for the military regulations enacted under 9066 were dubious.

The history explored herein likewise suggests that the common American practice of judicial deference to the political branches on wartime matters of national security is worth second-guessing.<sup>422</sup> The Court's opinions deferring to the government's purported national security needs in *Hirabayashi* and *Korematsu* are now routinely taught to law students as the embarrassments that they are. Meanwhile, the Court's decision in *Endo* mistakenly focused on the issue of loyalty, suggesting that such an elusive determination should be the central focus of wartime detention policies directed at persons who can lay claim to the protection of domestic law. Thus, even the victory of *Endo*—which did succeed in ushering in the demise of the camps—left far too much unresolved constitutional law on the table. Indeed, the inescapable judicial legacy of internment remains a historical precedent that sanctioned racial and ethnic discrimination, gutted the Suspension Clause, and gave constitutional sanction to "a policy of mass incarceration under military auspices."<sup>423</sup> How much better it would have been if the Court had taken to heart Alexander Hamilton's prescient words at the Founding, predicting that undoubtedly future occasions would require "an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution."<sup>424</sup>

The issues discussed in this historical treatment remain just as pressing today as they were during World War II. This past Term, the Supreme Court confronted constitutional challenges to the Trump Administration's issuance of a series of orders targeting particular nationalities for exclusion from entry to the

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422. Notably, the leading chronicler of the implementation of Regulation 18B draws a similar lesson from that episode, counseling: "[I]t is wise to be extremely sceptical when security services, or indeed anybody else, puts forward the claim that drastic action needs to be taken against an enemy within . . . ." SIMPSON, *supra* note 17, at 410.

423. GRODZINS, *supra* note 2, at 374.

424. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 87 at 394.

country.<sup>425</sup> And just as the Roosevelt Administration argued during World War II, the current administration maintained that its actions were predicated upon the needs of national security and it called upon the Court to give extensive—if not complete—deference to its decisions. In the view of the current Administration, the proper judicial course is not to “override[,]” but instead to defer “to the President’s judgments on sensitive matters of national security and foreign relations,” leaving it to him, free of judicial interference, to decide the proper course “to protect the Nation.”<sup>426</sup>

A majority of the Supreme Court essentially followed this course in upholding the so-called “Travel Ban,” holding that “the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving ‘sensitive and weighty interests of national security and foreign affairs.’”<sup>427</sup> The majority likewise cautioned that the judiciary “cannot substitute [its] own assessment for the Executive’s predictive judgments” with respect to matters relating to “national security interests.”<sup>428</sup> Although the majority labored to distinguish the Travel Ban case from *Korematsu* as, among other things, involving non-citizens, the fact remains that the Court in *Trump v. Hawaii* embraced a wholly deferential posture with respect to the executive branch’s assertions regarding the needs of national security. It did so, moreover, in the context of reviewing a policy targeting particular nationalities and to a large extent a specific religion.<sup>429</sup> A Court better versed in the perils of such an approach—as revealed in *Korematsu* and its companion cases that came before the Court during World War II—should have exercised greater pause in the face of such arguments. In this respect, we are left today to wonder whether we have learned anything from the past. Looking ahead, there is also the question whether Justice Jackson’s warning in his *Korematsu* dissent still rings true—namely, whether the Court has created precedents left to lie around like “a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>430</sup>

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425. See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (issued Jan. 27, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017); Exec. Order No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017).

426. Petition for a Writ of Certiorari at 16, *Trump v. Hawaii*, 138 S. Ct. 932 (2018) (No. 17-965).

427. *Trump*, 138 S. Ct. at 2422.

428. *Id.* at 2421.

429. See *id.* at 2433 (Sotomayor, J., dissenting) (“The Court’s decision today . . . leaves undisturbed a policy first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’ because the policy now masquerades behind a facade of national-security concerns.”).

430. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).